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HEARING

IN THE MATTER OF:

SATELLITE RATE ADJUSTMENT

DOCKET NO.

96-3 CARP-SRA

Tuesday,
March 18, 1997CARP Hearing Room LM414
Library of Congress
101 Independence Ave., S.E.
Washington, D.C. 20540

The above-entitled matter came on for hearing,
pursuant to notice, at 10:00 a.m.

BEFORE:

THE HONORABLE LEWIS HALL GRIFFITH, Chairperson

THE HONORABLE JOHN W. COOLEY

THE HONORABLE JEFFREY S. GULIN

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David Hummel, Witness
Marsha Kessler, Witness

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C-O-N-T-E-N-T-S

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E-X-H-I-B-I-T-S

<u>Exhibit No.</u>	<u>Description</u>	<u>Mark</u>	<u>Recd</u>
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SBCA

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P-R-O-C-E-E-D-I-N-G-S

(10:00 a.m.)

CHAIRMAN GRIFFITH: Ladies and gentlemen,
good morning.

Judge Cooley would like a moment to
discuss the scheduling with you, please.

JUDGE COOLEY: I just wonder, is everybody
here?

MR. GARRETT: Michele isn't here, so I
don't know how we can talk about the schedule.

JUDGE COOLEY: Does she intend to be here?

MR. GARRETT: Yes.

JUDGE COOLEY: Okay. Then we'll wait to
talk about the schedule, then.

CHAIRMAN GRIFFITH: Okay. Fine. Why
don't we do that, then. Yes. Okay.

Who is the first witness today?

MR. STEWART: Mr. Graff.

CHAIRMAN GRIFFITH: Mr. Graff will be.
All right. Are we ready to proceed?

MR. STEWART: Yes.

CHAIRMAN GRIFFITH: All right. Let the

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1 record reflect the Court Reporter has been previously
2 sworn and remains under oath.

3 Mr. Stewart?

4 MR. STEWART: Mr. Chairman, I have a brief
5 opening statement.

6 CHAIRMAN GRIFFITH: Please. Okay.

7 MR. STEWART: I would use the opportunity
8 of my day in the front of the room to introduce myself
9 again. I am John Stewart of the firm of Crowell and
10 Moring, L.L.P., and I'm here on behalf of the
11 Broadcaster Claimants Group. Here with me today, and
12 you've seen her in the hearing, is my colleague
13 Jessica Herrera.

14 First of all, what is the Broadcaster
15 Claimants Group? Well, it's the group of the stations
16 that -- the commercial stations that are actually
17 carried by the Satellite Carriers. It includes both
18 superstations -- that is, independent stations -- and
19 network affiliates.

20 Why are we here? Because the stations are
21 copyright owners. They create their own programs, and
22 they also combine those programs with others that they

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1 acquire from other sources, into the broadcast station
2 signals that are selected and retransmitted by the
3 Satellite Carriers here. And the broadcasters will
4 receive a share of the royalties that you set in this
5 proceeding.

6 I want to just harken back to something
7 that Mr. Garrett said in his opening statement, and
8 that is that the compulsory aspect of the compulsory
9 license here is asymmetrical. It applies to us. It
10 requires us, as well as all other copyright owners, to
11 sell our programs. It's not compulsory on the
12 Satellite Carriers. They can select a station or
13 choose not carry it if they reach that conclusion.

14 And presumably, the basis on which they
15 select stations and decide to carry them is that they
16 are profitable. They make a determination that they
17 can sell them to their subscribers, either on their
18 own or as part of a package, any way that's profitable
19 to them. So it's their selection, and that's a
20 marketplace determination. By and large, the
21 Satellite Carriers sell channels of programming, not
22 individual programs.

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1 Now, our evidence today will consist of
2 the testimony and exhibits of Mr. William Graff, who
3 is the Director of Programming at station WPIX in New
4 York. WPIX is a superstation carried by two of the
5 Satellite Carriers to about 700,000 subscribers.

6 Mr. Graff's testimony, perhaps unlike some
7 of the other testimony you have heard or will hear
8 here, is hands-on experience with one aspect of what
9 goes together with other program material to create
10 the value that the Satellite Carriers receive when
11 they decide to carry these signals and sell them to
12 their subscribers.

13 Mr. Graff will describe the work stations
14 do in creating their own programming and putting that
15 programming together with programs from other sources
16 to create a broadcast schedule. And finally, he'll
17 talk about the station's efforts in creating a unique
18 image for the station, a distinguishable image from
19 other stations.

20 Now, once you've heard that testimony and
21 the testimony of other witnesses, we will argue in our
22 proposed findings that these efforts by stations add

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1 to the value that the Satellite Carriers received when
2 they select stations and resell them to subscribers.
3 To quantify that value, we will rely on the evidence
4 presented by other witnesses here -- economic evidence
5 and analogous marketplace evidence -- to set a rate.

6 And we join the Joint Sports Claimants and
7 other copyright owners in requesting a rate of 35
8 cents, 36 cents, and 38 cents applicable to all
9 stations that are retransmitted by Satellite Carriers.

10 CHAIRMAN GRIFFITH: Okay. Thank you very
11 much.

12 MR. STEWART: I would call my first
13 witness.

14 CHAIRMAN GRIFFITH: All right. And only
15 witness.

16 Mr. Graff, if you'll raise your right
17 hand, please, sir.

18 WHEREUPON,

19 WILLIAM H. GRAFF

20 was called as a witness by Counsel for the Broadcaster
21 Claimants Group and, having been first duly sworn,
22 assumed the witness stand, was examined and testified

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1 as follows:

2 VOIR DIRE EXAMINATION

3 BY MR. STEWART:

4 Q Would you state your name, please?

5 A William Graff.

6 Q What is your position, Mr. Graff.

7 A I am Director of Programming at WPIX in
8 New York.

9 Q What responsibilities do you have in that
10 position?

11 A I am involved in the acquisition and
12 scheduling of programming and the creation of the
13 entire on-air look of the station.

14 Q And how long have you been in that
15 position at WPIX?

16 A I've been there for two years.

17 Q What was your prior position?

18 A Prior to that, I was Director of
19 Programming at WJZY and WFVT in Charlotte, North
20 Carolina.

21 Q What were your duties there?

22 A Similar to WPIX.

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1 Q And before that?

2 A Before that, I was Director of Programming
3 and Operations at WPTY in Memphis. I had more direct
4 responsibility for the on-air look of the station.

5 Q And where were you before WPTY?

6 A Prior to that, I was at KSTW in Seattle as
7 Program/Research Manager.

8 Q And so you were not the Program Director
9 at KSTW?

10 A There was no Program Director at KSTW.

11 Q All right. And what were your duties at
12 KSTW?

13 A To perform research and work with the
14 General Manager in programming acquisition and
15 scheduling decisions to provide the sales department
16 with relevant research to maximize the salability of
17 the station's schedule.

18 Q And where were you before KSTW?

19 A I worked for a national sales rep. firm
20 called Telerep. in New York City. They represent
21 local stations from around the country to national
22 advertisers.

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1 Q Mr. Graff, have you testified in these
2 proceedings before?

3 A No, I have not.

4 Q Have you testified anywhere before?

5 A No, I have not.

6 Q Well, congratulations.

7 (Laughter.)

8 Now, do you have with you a document -- a
9 12-page document entitled "Statement of William H.
10 Graff"?

11 A Yes, I do.

12 Q And is this your statement, Mr. Graff?

13 A Yes, it is.

14 Q Do you have any corrections to make at
15 this point?

16 A I have no corrections to make.

17 MR. STEWART: All right. I would offer
18 Mr. Graff for voir dire at this point.

19 CHAIRMAN GRIFFITH: Any questions, Mr.
20 Seiver?

21 MR. SEIVER: No questions for voir dire.

22 CHAIRMAN GRIFFITH: All right. Thank you.

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DIRECT EXAMINATION

BY MR. STEWART:

Q Now, Mr. Graff, turning to the first page of your statement, once a station acquires and creates its own programs, is how those programs are scheduled important?

A Yes. It's very important to maximizing the station's viewership.

Q Can you tell us what your objective is in scheduling the programming?

A The objective is to offer as unique a block of programming as possible compared to what the competition is offering, to have programs that can flow the audience from one into another, programming of similar appeal, and to take advantage of viewers who are joining the set at a given time.

Q Do you also cross promote programs?

A Yes. We also cross promote both the subsequent programming of a given day within a particular program, as well as programming that is running in the same time period on the next or a subsequent day, because the viewers who are watching

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1 you at a particular time on a given day are most
2 likely to watch you at that time on the next day.

3 Q All right. Now, on page 2 of your
4 statement, you talk about something that you call a
5 clear station image. Can you tell us what you mean by
6 that?

7 A The station has mixed its programming, its
8 identification announcements, the PSAs -- public
9 service announcements -- the promotional announcements
10 that it runs, to all have a similar look and to appeal
11 to a similar audience.

12 Q What is the purpose of developing that
13 image?

14 A To differentiate oneself and one's own
15 station from all of the other programming choices that
16 are out there, and to create a unique image in the
17 mind of the viewer.

18 Q All right. Now, would you turn, please,
19 to Exhibit 2 which is attached to your statement.
20 First, can you tell us what that is?

21 A Yes. These are program schedules -- a
22 weekly program schedule for 24 hours of the stations

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1 that are carried on satellite systems for a typical
2 week in March of 1996, and the second group of the
3 same stations for a typical week of July 1996.

4 Q And what do these program schedules show?

5 A They show the variety of programs that
6 each individual station offers.

7 Q Now, you say in your direct statement that
8 the stations offer programs, including the most
9 popular programs in the country, as well as programs
10 of special appeal to various different demographic
11 groups. Is that correct?

12 A That is correct.

13 Q Could you illustrate that for us?

14 A Certainly. If you turn, say, to KNBC Los
15 Angeles, which would be the fourth schedule in the
16 list, you can see that they run programs on Thursday
17 night at 9:00, which is Seinfeld, 10:00 ER. These are
18 among the most popular programs in the country.

19 Returning to the first page, KCNC, you can
20 see that Sunday nights at -- from 10:30 until
21 midnight, they are running locally produced sports
22 programs that are unique to that market.

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1 Q And would you turn to the page for WPIX,
2 the March page for WPIX. These are in alphabetical
3 order, is that right?

4 A That is correct.

5 Q Sorry there is no page number here. Do
6 you have the WPIX page?

7 A Yes, I do.

8 Q In taking a look at that page for March,
9 could you explain to us how the program scheduling
10 objectives that you talked about before are manifested
11 here?

12 A Certainly. In terms of audience flow,
13 let's just look at Wednesday afternoon. You can see,
14 starting at 2:00, we're running children's programming
15 as children are arriving home from school. The
16 earlier programs are aimed at preschoolers, and then
17 from 3:00 on at children coming home from school.
18 That then leads into young appeal, both teens and
19 young adult appeal programming at 5:00 with Beverly
20 Hills 90210.

21 As adults are joining the set between 5:00
22 and 8:00, we are running young appeal sitcoms -- Full

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1 House, Blossom, Fresh Prince, and Family Matters.
2 These are directly promotable -- the viewers in these
3 are directly promotable into the prime-time
4 programming that night of the WB Network sitcoms --
5 Sister Sister, Parenthood, and so on. So we create an
6 audience flow from younger to older as people are
7 joining the set.

8 Q And you do this on purpose?

9 A Yes. This is not by accident.

10 Q Isn't it the case that every other station
11 follows the same kind of programming strategy as WPIX?

12 A No, that is not the case. At the time
13 that we are running the young appeal dramas and
14 sitcoms, most of the other stations in the market are
15 running news, which generally draws an audience over
16 the age of 35. Even independent stations or non-major
17 affiliates who don't run news at that time will choose
18 other programs that are not of similar appeal to
19 these.

20 Q All right. Now, would you please turn to
21 Exhibit 3 attached to your testimony. And tell us
22 what these are, please.

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1 A Okay. On the first page of the exhibit,
2 you've got an advertisement from Prime Time 24 for
3 their carriage of WJLA Washington, D.C. And part of
4 what they are promoting is the '96 Presidential
5 Election coverage from the nation's capital. This is
6 a unique service that other network affiliates -- ABC
7 affiliates from around the country -- would not
8 necessarily have to offer, because they are not
9 broadcasting from the nation's capital.

10 Q All right. And what are the remaining
11 pages of Exhibit 3?

12 A The remaining pages are programming
13 highlights for Prime Time 24's DBS and c-band systems,
14 showing each of these stations and what they uniquely
15 have to offer from their region of the country. For
16 instance, the ABC affiliate WJLA -- once again, the
17 '96 Election coverage, as well as the sports from the
18 region; WNBC, with coverage from The Big Apple, New
19 York City.

20 KNBC will have broadcasting from the
21 entertainment capital of the world. KPIX in San
22 Francisco, once again, with regional sports, the

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1 49'ers, Raiders, Giants, and so on. And going to the
2 next page, KOMO from Seattle, which has been voted the
3 best newscast in the United States six of the last
4 eight years, this gives people an opportunity to see
5 a news that is head-and-shoulders above most other
6 operations.

7 Q All right. And those are examples of
8 programs or station identities along the lines that
9 you were discussing?

10 A Yes.

11 Q Finally, let's turn to Exhibit 4, please.
12 What are these?

13 A These are examples of locally produced
14 programs that are available on the stations carried on
15 the satellite systems, the local stations carry on the
16 satellite systems.

17 Q Are these programs available from other
18 sources?

19 A No, they are not.

20 Q Why not?

21 A They are uniquely available from these
22 individual stations because they are produced by these

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1 stations and are not made available through
2 syndication.

3 MR. STEWART: All right. Thank you.
4 That's all I have on direct.

5 CHAIRMAN GRIFFITH: All right. Cross
6 examine, Mr. Seiver?

7 MR. SEIVER: Thank you.

8 CROSS EXAMINATION

9 BY MR. SEIVER:

10 Q Good morning, Mr. Graff.

11 A Good morning.

12 Q My name is John Seiver. I'm one of the
13 counsel for the Satellite Carriers in this case.

14 You do have the distinction of testifying
15 for your first time today?

16 A Yes.

17 Q If you don't understand a question that I
18 ask, just ask me to repeat it. If there is an
19 objection, you should wait until the court rules
20 before you give an answer, so you don't
21 unintentionally tell me something I shouldn't know.

22 As I understand it, your testimony today

1 -- let me start over. You work for WPIX, right?

2 A That's correct.

3 Q But your testimony today is on behalf of
4 all of the broadcaster claimants?

5 A That's correct.

6 Q And you heard Mr. Stewart, in his opening,
7 mention that these are superstations as well as the
8 network affiliates that are apparently on the
9 satellite -- currently on the satellite?

10 A Correct.

11 Q I noticed that in the direct case that he
12 filed it says, "The Broadcaster Claimants Group
13 includes certain of the commercial television stations
14 retransmitted by Satellite Carriers during the 1989 to
15 1996 period." I was curious: is the use of the word
16 "certain" significant to you?

17 MR. STEWART: Objection. I believe Mr.
18 Seiver is quoting from a pleading that I filed without
19 having established whether the witness knows anything
20 about that pleading or has ever seen it before.

21 CHAIRMAN GRIFFITH: Mr. Seiver?

22 MR. SEIVER: Your Honor, he is here on

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1 behalf of the Broadcaster Claimants. I want to find
2 out who he represents.

3 CHAIRMAN GRIFFITH: All right. If he
4 knows, you may answer, sir.

5 THE WITNESS: I'm afraid I can't answer
6 that question.

7 BY MR. SEIVER:

8 Q Well, there are seven superstations that
9 are currently on the satellite, is that right?

10 A That may be. I'm not an expert on that.
11 I can't answer that question.

12 Q Oh, you're not an expert on superstations?

13 A On that aspect of superstations.

14 Q On who the other superstations are that
15 are on the satellite?

16 A That's correct. Because we don't compete
17 against those superstations for any type of revenue.

18 Q So your testimony today is as a local
19 affiliate, just in the New York market, is that right?

20 A No. My testimony is as Program Director
21 of WPIX and all that entails.

22 Q But as the programs are distributed only

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1 in the New York market, not nationally?

2 A Programs are also distributed over
3 satellite systems and cable systems outside of the New
4 York market.

5 Q And you're familiar with how WPIX is
6 distributed outside the New York market?

7 A Somewhat, yes.

8 Q Well, I guess I have to understand that.
9 You're responsible for acquiring and scheduling
10 programs?

11 A Correct.

12 Q Do you take into consideration when you're
13 scheduling what other superstations that are also
14 distributed on the satellite are doing for their
15 scheduling?

16 A No, I do not.

17 Q That doesn't mean anything to you?

18 A No.

19 Q And as far as the cable distribution is
20 concerned, are you concerned with what other stations,
21 both local and distant, that a particular cable system
22 may be also selling along with WPIX in a package?

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1 A No.

2 Q Let me move on, then.

3 You don't, then, whether Mr. Stewart's
4 group of Broadcaster Claimants on who you're
5 testifying includes all of the superstations that are
6 currently on the satellite, is that right?

7 A That is correct.

8 Q And you don't know, also, whether it
9 includes all of the commercial affiliates, commercial
10 network affiliates, is that right?

11 A That's correct. I don't know that
12 absolutely for a fact.

13 Q I meant that are on the satellite. But
14 you did include all of those stations' schedules in
15 the exhibit to your testimony?

16 A Right.

17 Q And you --

18 A To my knowledge, those are the stations
19 that are on the satellite.

20 Q And to your knowledge, you picked those in
21 order to make a demonstration about their programming?

22 A Correct.

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1 Q Even though you're not really aware of who
2 they are or what they're doing?

3 A I don't compete against them. I've looked
4 at their schedules, and I'm aware of them to the
5 extent that I've looked at their schedules.

6 Q I see. So at some point, you did know who
7 all seven superstations were, if you picked them to
8 put their programming --

9 A Yes.

10 Q But as you sit here today, you couldn't
11 give me that list?

12 A No, I couldn't off the top of my head.

13 Q And you couldn't tell me, of course, then,
14 what their satellite or cable subscriber counts are?

15 A No.

16 Q Are you generally familiar with WTBS?

17 A I'm generally familiar with the station,
18 yes.

19 Q How about WGN?

20 A I'm familiar with that station also.

21 Q In fact, you're a little more familiar
22 with WGN than WTBS, aren't you?

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1 A Yes.

2 Q And that's because it's owned by the same
3 company that owns you?

4 A Correct.

5 Q Would it be fair to say that you're also
6 a little more familiar with KTLA?

7 A Probably not, no.

8 Q Aren't they also owned by the same company
9 that owns you?

10 A They are.

11 Q How about KWGN?

12 A Only to the extent that it's a sister
13 station of ours, owned by the same company that we
14 are.

15 Q Well, I've listed four stations now that
16 are superstations. And I've asked you to accept,
17 subject to check -- and you can look at your exhibits
18 if you need to -- that there are seven all together.
19 And now we've established that four are commonly owned
20 by the Tribune Company?

21 A WTBS is not owned by the Tribune Company.

22 Q No, I didn't mean WTBS. I meant WGN,

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1 WPIX, KTLA, and KWGN.

2 A Yes.

3 Q Those four.

4 A Yes.

5 Q How large is the Tribune Company?

6 A I couldn't answer that question.

7 Q Do you have any interaction with the
8 Tribune Company's executive offices?

9 A Only as it directly relates to my
10 position.

11 Q Do you know how many other stations
12 besides these four that I've listed they own?

13 A Yes.

14 Q Could you tell me what that number is?

15 A We've got those four. We have WLVI in
16 Boston, WPHL in Philadelphia, KHTV in Houston, and
17 KSWB in San Diego.

18 Q Would you accept, subject to check, that
19 Tribune owns about 14 stations, broadcast stations?

20 A Not at this time.

21 Q Well, didn't they just -- are you
22 including the acquisition of Renaissance?

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1 A No, I'm not.

2 Q Including the acquisition of Renaissance,
3 would that be about 14 stations?

4 A That would be about 14 stations.

5 Q And has that acquisition closed or --

6 A No.

7 Q Is that why you're --

8 A That's why I'm not including it at this
9 time.

10 Q That's why you're not including it.

11 So you are aware, generally, of
12 Tribune's --

13 A Yes.

14 Q And I presume you are also aware of the
15 Tribune's ownership of sports teams, am I right?

16 A Yes. I'm aware that they own the Chicago
17 Cubs. It's the only sports team I'm aware that they
18 own.

19 Q That's the only sports team they have an
20 interest in.

21 Are you aware of the sports programming
22 that is carried on the other Tribune stations?

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1 A Some of it, in a cursory way.

2 Q You really focus on the sports that's on
3 WPIX?

4 A That is correct.

5 Q Now, do you know what the total revenues
6 are of the Tribune?

7 A No.

8 Q Do you know if they are the second largest
9 collection of broadcast stations in the country, given
10 the Renaissance acquisition?

11 A I think it depends on what your measuring
12 stick is for broadcast group size. And so I really
13 couldn't answer that question.

14 Q You don't know whether it's a billion or
15 \$2 billion in revenues?

16 A I have no idea.

17 Q Whatever the number would be. But it's a
18 big company?

19 A Yes.

20 Q We can get that?

21 A Yes.

22 Q Thanks.

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1 Do you know if the Tribune is itself a
2 television network?

3 A No, Tribune is not a television network.

4 Q Does the Tribune Company, your parent
5 company, seek and obtain national television ads and
6 ad dollars for its stations?

7 A Yes. On a station-by-station basis, they
8 do seek to sell time to national advertisers.

9 Q Does that happen on WPIX?

10 A Yes.

11 Q Are those national ads shown in the New
12 York area?

13 A Yes, they are.

14 Q And to your knowledge, they are also shown
15 on two of the satellite and cable subscribers that
16 receive on WPIX?

17 A That is correct.

18 Q And do you know if the rates for those
19 particular ads are based on the number of viewers of
20 WPIX in the New York area only?

21 A Yes.

22 Q So the rates for those national ads do not

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1 include cable carriage or satellite carriage of WPIX?

2 A Not outside of the New York designated
3 market area.

4 Q Have you heard of an entity called Tribune
5 Plus?

6 A It rings a bell, but I'm not aware of what
7 that organization is.

8 Q That's not an organization that actually
9 places ads on WPIX in New York?

10 A I wouldn't know. I don't work in the
11 sales department. I don't deal with the insertion of
12 advertising.

13 Q The programming that you do buy does carry
14 ads, though, doesn't it?

15 A Some programming that we buy carries
16 national barter commercials.

17 Q And do you know whether the Tribune
18 itself, when it is making contracts for these national
19 ads, includes for itself the cable and satellite
20 carriage of its stations that it owns?

21 A To my knowledge, local stations do not
22 participate in the revenue from national advertising

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1 in barter programming.

2 Q So when the Tribune makes its deal with
3 the national advertisers, it keeps the revenues from
4 the cable and satellite viewer --

5 A I don't know what deal you're talking
6 about with national advertisers.

7 Q I'm sorry. I thought we had established
8 that the Tribune does place national ads on its
9 stations.

10 A Each individual station sells their time
11 nationally. I don't know what sort of mechanism there
12 is to sell the time on Tribune's stations as a group.
13 Is that what you're referring to?

14 Q That's exactly what I'm referring to.

15 A I'm not aware of that.

16 Q You don't know whether it occurs or not?

17 A I do not know.

18 Q And you don't know whether, then, as well
19 if the Tribune is including cable or satellite
20 carriage for determining what rates are charged for
21 national ads it may contract with?

22 A I know that WPIX, in its sales of national

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1 time, does not include cable or satellite viewers in
2 setting their rates.

3 Q Have you ever considered trying to sell
4 ads to national advertisers based on the total cable
5 and satellite subscribership at WPIX?

6 A That's totally outside the purview of my
7 position. I have nothing to do with advertising
8 sales.

9 Q When you're purchasing programming in the
10 marketplace, what do you utilize as your revenue
11 source?

12 A Local advertising.

13 Q Revenues.

14 A Exactly.

15 Q Didn't you think that if you could sell
16 national ads and get national ad revenues you could
17 buy better programming?

18 A Well, when I say "local advertising," I
19 mean advertising sold to meet the local -- to reach
20 the local market. Those ads are sold both to local
21 advertisers, the local car dealers, and so on, as well
22 as national advertisers -- you know, phone companies,

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1 or so on.

2 But the target of both groups of
3 advertising is the same, and the rate structure that
4 both groups of advertisers are dealing with, to my
5 knowledge, is the same -- to reach the local New York
6 designated market area. They are not to reach viewers
7 outside that.

8 Q Well, what is the size of the New York
9 designated market area?

10 A Approximately 6,800,000 households, TV
11 households.

12 Q Six million. Do you know what WPIX's
13 cable subscribership is?

14 A WPIX, in the New York designated market
15 area, is carried on virtually every cable system in
16 that market, which reaches about 69 percent of the
17 households.

18 Q So if you look at cable carriage, that
19 would be about, let's say, 70 percent, about four
20 million are watching it on cable?

21 A Yes.

22 Q Do you know how many outside New York --

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1 DMA -- are watching WPIX on cable?

2 A I don't have that figure in my mind, no.

3 Q Has that figure ever been communicated to
4 you?

5 A At some point it may have. I'm just not
6 aware of it. It's not a top-of-mind issue.

7 Q Do you know, if I told you that the trade
8 press reported a WPIX total cable subscribership of
9 about 10 million, that that sounds accurate to your
10 recollection?

11 A I couldn't say.

12 Q And have you ever taken the time to learn
13 the satellite subscribership totals for WPIX that are
14 distributed through Superstar?

15 A I think I may have heard it once or twice.
16 But once again, I don't recall that number.

17 Q If I told you it was about half a million
18 or 600,000, does that sound about right?

19 A That could be right.

20 Q Let's assume, then, for purposes of our
21 discussion, that the total cable carriage is about 10
22 million total. Satellite carriage is about 600,000.

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1 Let's subtract out what might be the four million in
2 New York. There's about another six million worth of
3 viewers -- not worth, excuse me. Let me rephrase
4 that. Another six million viewers that are watching
5 your signal, or have access to your signal.

6 A Yes.

7 Q Is that right? That could be potentially
8 very valuable to you, couldn't it?

9 A I suppose if -- you know, there are
10 circumstances that could possibly exist where that
11 could be. You know, it's a supposition.

12 Q Well, would you think that a reasonable
13 approach in your position as a program acquirer and
14 scheduler is that you go over to your advertising side
15 and say, "Look, you guys, sell those other six million
16 viewers to these national advertisers that we've got,
17 and I'll put on better programming" -- is that
18 something that went on?

19 A You're asking me to explore a method of
20 doing business that -- considering a method of doing
21 business that I have not -- and I'm not even aware
22 that anyone has done. I don't understand the

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1 question, really.

2 Q Well, WGN is a sister station, is that
3 correct?

4 A Yes.

5 Q Do you know if they sell ads based on the
6 total number of their cable and satellite
7 subscribership?

8 A I believe WGN is structured significantly
9 differently than WPIX, in that the signal that they
10 send out to their cable and satellite subscribers
11 outside of the Chicago market differs from the signal
12 that is within their Chicago market.

13 Q And how does it differ?

14 A It has programming which is not exclusive
15 to WGN, and there may -- I'm not aware of what the
16 advertising arrangement is, whether they allow for
17 local insertion of advertisements by cable system
18 interconnects.

19 Q Do you know what WTBS does with respect to
20 its national distribution?

21 A My understanding is that WTBS offers the
22 exact same signal locally in Atlanta as nationally.

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1 Q It does not substitute ads or change out
2 programming?

3 A No. I don't know what it does as far as
4 advertising is concerned, but I know that its
5 programming is consistent within the Atlanta market
6 and without.

7 Q With respect to the copyright royalty
8 rates, do you understand the distinction between
9 Syndex Proof and non-Syndex Proof superstations?

10 A Probably not fully.

11 Q Do you know that there's a difference in
12 rates for stations that fit within those categories?

13 A No, I really know nothing about that.

14 Q And you don't know whether there's a
15 different rate for a network affiliate?

16 A No.

17 Q So the actual rates that are paid
18 copyright are not something within your testimony
19 today?

20 A Correct.

21 Q And it would be fair to say they are not
22 within even your expertise or understanding?

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1 A That would be fair to say.

2 Q So when Mr. Stewart, in his opening, made
3 a comment about the rates that he would support in
4 this, it had nothing to do with you?

5 A That's correct.

6 Q Do you believe that sports programming is
7 an important aspect of the programming on WPIX?

8 A Yes.

9 Q When I was reading your direct testimony,
10 I didn't see anything about the sports programming
11 being valuable. We talked about a lot of different
12 things and children's programming, and what not, and
13 political programming. I don't think until page 4, in
14 your last sentence, that you say "shows of sports
15 enthusiasts." Is there any reason why you didn't
16 highlight the sports programming that WPIX carries?

17 A No, other than you were probably talking
18 more about regularly scheduled programming than
19 occasional seasonal programming. That would be the
20 only distinction that would come to mind.

21 Q Is it your testimony that the regularly
22 scheduled programming is more valuable to the

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1 Satellite Carriers than sports programming?

2 A I really wouldn't know. I have not spoken
3 to Satellite Carriers and gotten a general consensus
4 of their set of priorities.

5 Q Well, look on page 3 of your testimony, if
6 you would. You speak of your programming and
7 scheduling efforts. And the last sentence of that
8 paragraph says, "The fact that Satellite Carriers are
9 freed from the burden and expense of creating and
10 scheduling their own channels of programming, because
11 stations do that for them, is an additional component
12 of the value of the stations that retransmit." So
13 you're testifying that this programming that you do is
14 valuable?

15 A Yes.

16 Q But I thought you just said you don't know
17 what's valuable to the Satellite Carriers.

18 A I didn't say -- I said I didn't know which
19 is more valuable to them, whether the regular
20 entertainment programming is or the sports, exactly
21 which aspect. I think by the fact that we're carried
22 indicates a significance of value.

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1 Q I see. You carry a very important sports
2 team on WPIX, don't you?

3 A Yes, we do.

4 Q And they are?

5 A New York Yankees.

6 Q But the word "New York Yankees" doesn't
7 appear anywhere in your testimony?

8 A No. I did not include specifics of all of
9 the programming that we carry.

10 Q How many games a season do you carry?

11 A Generally, 50 games.

12 Q Is that by contract with the Yankees
13 directly?

14 A No. That is by contract with Madison
15 Square Garden Television, who are the rights holders
16 to the New York Yankees Television.

17 Q And who owns Madison Square Garden
18 Television, do you know?

19 A Right now, I think Chuck Dolan is buying
20 them.

21 Q Now, do you, as part of your programming
22 responsibilities, negotiate any of the relationship

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1 between WPIX and MSG?

2 A No, I do not.

3 Q Somebody else in your organization does
4 that?

5 A That is correct.

6 Q Are you familiar at all with any of the
7 ongoing negotiations between MSG and WPIX concerning
8 the continued carriage of the Yankees?

9 A Other than that it is ongoing, that is all
10 I'm aware of.

11 Q Is there a possibility that the Yankees
12 won't be on WPIX anymore?

13 A That is a possibility.

14 Q The contract for carriage of the Yankees
15 has not been renewed?

16 A I don't know exactly what the state of
17 that contract is.

18 Q Do you know whether another station in the
19 New York area would be picking up the Yankees
20 programming?

21 A That would be possible.

22 Q Have you ever heard of a station called

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1 WBIS?

2 A Yes, I have.

3 Q Is that the station?

4 A That would most likely be the station.

5 Q And who is WBIS owned by, do you know?

6 A WBIS is co-owned by Madison Square Garden
7 Television and Dow Jones. However, my understanding
8 of the purchase of Madison Square Garden by Mr. Dolan
9 is that WBIS was not included in that purchase.

10 Q But as of right now, it's uncertain as far
11 as the continuation of the Yankees?

12 A I don't have a schedule that I've
13 implemented at this point.

14 Q You are responsible for -- is the term
15 "counterprogramming" or programming other things
16 around, let's say, the Yankee games?

17 A Yes. Yeah, I wouldn't say
18 counterprogramming is the proper term.

19 Q Counterprogramming is other stations, I
20 guess, is that right?

21 A Right.

22 Q I'm sorry. What do you call it when you

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1 try to program around particular --

2 A Maximizing audience flow.

3 Q So the presence or absence of the Yankees
4 is obviously something that is going to be important
5 to your programming decisions?

6 A Yes.

7 Q And even though we don't know the relative
8 value, the sports programming is something that you
9 believe is valuable to the Satellite Carriers. Is
10 that right?

11 A I would believe it has a certain value,
12 yes.

13 Q If the Yankees -- let me start over. If
14 MSG does not continue to sell you the rights to
15 broadcast the Yankee games, do you feel that your
16 signal is going to be less valuable than for the
17 Satellite Carriers that carry it?

18 A Not knowing what the relative value is of
19 the various types of programming that we supply to the
20 Satellite Carriers, I couldn't say for sure that the
21 substitute programming that we would run instead of
22 Yankees is more or less valuable than Yankees.

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1 Q I understand your statement about not
2 knowing the relative value. Do you have any
3 understanding of an absolute value of particular
4 blocks of programming for the Satellite Carriers,
5 whether, you know, carrying Seinfeld on an NBC station
6 is going to be worth a million dollars, or carrying,
7 let's say, the Yankees would be worth a certain amount
8 of money?

9 A I really don't -- I couldn't answer that
10 question.

11 Q Well, you don't actually sell programming
12 rights anyway. You're in the business of acquiring
13 them, right?

14 A That's correct.

15 Q And you're in the business of acquiring
16 them so you can package them into your channel and put
17 them out over the air in the New York area?

18 A Yes.

19 Q And you testified that if someone picks
20 them up and puts them somewhere else, that's really
21 not a concern of yours?

22 A That's correct.

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1 Q And you make your economic decisions as to
2 what programming you buy, and what advertisers you
3 take, and your program decisions, based on the New
4 York DMA?

5 A That's --

6 JUDGE GULIN: Let me just clarify
7 something. You said it was not a concern of yours.
8 Do you mean you personally, or a concern of the
9 station?

10 THE WITNESS: A concern of the -- what, in
11 particular, concern about -- about what, in
12 particular, are you referring to?

13 JUDGE GULIN: Well, the prior question you
14 were asked, whether it would be a concern of yours
15 whether your station's programming was a rebroadcast,
16 did you mean to say that that was not a concern of
17 you, personally or it --

18 THE WITNESS: Myself personally. I'm not
19 speaking for the station.

20 JUDGE GULIN: I understand.

21 BY MR. SEIVER:

22 Q Well, then, let me ask you: do you know

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1 if that is a concern of the station?

2 A I really don't know.

3 Q That's not something you've talked about
4 with upper management or anybody else in advertising?

5 A Not to the extent where someone has given
6 me a definitive statement of -- that this has or does
7 not have a specific level of value.

8 Q And you yourself never pursued the issue
9 of exploring -- expanding the audience counts for
10 purposes of making your programming decisions?

11 A No. My knowledge of the way advertising
12 is sold does not lend itself -- the way advertising is
13 sold, to my knowledge, does not lend itself to
14 creating what might be considered an a hoc region of
15 satellite and cable receivers across the nation to
16 deliver a measurable audience to the advertiser.

17 Q And what is the basis for making that
18 statement?

19 A That markets are measured -- that
20 audiences are measured either in local markets, in
21 local DMAs by Nielsen, or they are measured nationally
22 by Nielsen. And there are, as far as I'm aware, no

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1 sales markets that are contoured around where
2 superstations are carried.

3 Q Which would be the entire country?

4 A We're not carried in the entire country.

5 Q You don't know whether WPIX is available
6 to residents in every state?

7 A We may be available to certain residents,
8 but where we might be available and where we're
9 carried, I don't know exactly where the footprint is
10 for the satellites that carry us, and so on.

11 Q And you've never asked, for instance,
12 United Video or Superstar to give you the geographic
13 distribution of the people that subscribe to WPIX?

14 A I may have seen that. I think I have seen
15 that information once or twice.

16 Q But for whatever reason, you never used it
17 for --

18 A No.

19 Q -- doing anything. It's been for
20 informational purposes only?

21 A Yes.

22 Q And you don't know whether the advertising

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1 people have done anything with that information?

2 A Correct. They haven't done anything to my
3 knowledge with it.

4 Q Oh.

5 A I mean, I haven't heard of anything that
6 they've done to -- that the WPIX advertising people
7 have done with it.

8 Q Now, you had made this statement, but
9 correct me if I'm wrong. I thought earlier we had
10 talked about how WGN is structured differently, and it
11 does sell ads, does it not, nationally?

12 A I don't know. In other words, they sell
13 ads on their -- are you asking if they sell ads on
14 their --

15 Q Yes.

16 A -- if they sell ads on their cable system
17 nationally?

18 Q On superstation feed.

19 A On the superstation feed.

20 Q They give a separate feed?

21 A Yeah.

22 Q Do you know whether -- the NBC affiliate

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1 in New York is also one of the stations that I think
2 you included in your programming.

3 A Yes.

4 Q Do you know whether the NBC affiliate in
5 New York also provides a separate feed for Prime
6 Time 24 to uplink?

7 A I don't know about that.

8 Q Do you have any knowledge of whether that
9 NBC affiliate also puts in national ads for the
10 particular uplink feed?

11 A No, I have no knowledge of that.

12 Q Do you have any knowledge of whether the
13 NBC feed that I was just referring to is separately
14 identified on air as a satellite station?

15 A No, I have no knowledge of that.

16 Q We have been talking about sports and the
17 WPIX has the Yankees and the MSG. We have been
18 talking also about how important viewers are to your
19 station, is that right?

20 A Yes.

21 Q And I guess the flip side of -- well, not
22 the flip side, but the reason viewers are important to

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1 your station is because of ratings, is that right?

2 A That is correct.

3 Q And ratings means people are watching you
4 and not something else, right?

5 A That is correct.

6 Q And if they're watching you, advertisers
7 are happier, is that right?

8 A Yes.

9 Q Now, you haven't gotten the total
10 subscriber counts for cable or for satellite, you
11 said. Have you been aware of any ratings information
12 for satellite or cable subscribers?

13 A No.

14 Q Are ratings important to you in
15 determining what programming to buy or
16 counterprogramming to buy?

17 A Yes. Yes, I did say that right. I did
18 mean counterprogram.

19 Q So, in that sense, if particular programs
20 have higher ratings, you're going to be more likely to
21 put that on than programming that has lower ratings,
22 just as a general rule?

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1 A Yes.

2 Q And, in particular, when you're going to
3 counterprogram against other stations, you're going to
4 look at what their strong-rated programs are, and then
5 you intend to put on a high-rated program, or do you
6 just give up the time slot and put on a low-rated
7 program?

8 A It's situational. Generally, because we
9 are a fairly strong station within our market, and we
10 are able to promote to a significant cumulative
11 audience, we feel that we can go with strength against
12 strength, should we choose to. But generally, a
13 strong show will -- no matter how strong a show is,
14 there is going to be an audience that is not
15 interested in that particular program, and we'll
16 consider trying to reach the audience that is not
17 served by that program.

18 Q How have the ratings been for the Yankees?

19 A The ratings for the Yankees have been
20 okay, better as the season wore on as they got closer
21 to the World Series.

22 Q We're talking about the '96 season?

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1 A Right.

2 Q And very good towards the end of the
3 season?

4 A I would say they improved somewhat. They
5 were pretty good all year, though.

6 Q And it was interesting that they were
7 playing a team that is also a superstition team, is
8 that right?

9 A In the World Series?

10 Q Yes.

11 A Yes.

12 Q Do you know whether or not Major League
13 Baseball itself has a policy concerning superstition
14 carriage of local teams' games?

15 A I don't know exactly what their policy is,
16 other than obviously it is not a policy that restricts
17 in a very -- you know, in a major way, the carriage of
18 these games, because each of these stations is able to
19 carry baseball games.

20 Q I'm sorry. Did you tell me how many games
21 you do carry?

22 A 50.

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1 Q 50?

2 A Yes.

3 Q Are they all home games?

4 A No, they are not.

5 Q Evenly split between home and away?

6 A Fairly.

7 Q And WTBS also carries Braves games, is
8 that right?

9 A That's correct.

10 Q Is that something you would look at in
11 baseball schedules to see where they might be showing
12 a Braves game, so that if you don't have a Yankees
13 game on you might want to do something differently?

14 A No. We don't counterprogram the Atlanta
15 Braves for the New York audience.

16 Q Okay. Even though WTBS is distributed in
17 the New York area?

18 A That's correct.

19 Q But that's not something that crosses your
20 mind?

21 A No. No. The Atlanta Braves do not have
22 a large enough viewership to be a significant

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1 competitor when compared to WNBC or WCBS or WABC or
2 other broadcast stations in the New York market.

3 Q If the Braves are on a different station
4 in the New York market, would that mean something to
5 you? For instance, they might be on WPIX, I presume,
6 because they carry the Mets -- I mean, I'm sorry,
7 WWOR?

8 A Oh, I see. In other words, if the Mets
9 are playing the Braves on that day.

10 Q Right.

11 A We might be aware of it and, you know,
12 assuming that the Braves are -- you know, have been a
13 strong team, and the Mets have a certain local
14 interest that a Mets-Braves game may do better in the
15 New York market than, let's say, a Mets-San Diego
16 Padres game, and we might -- if it's in prime time, we
17 may look to counterprogram that particular game.

18 Q But as far as you're concerned, what WTBS
19 may carry in the New York market is -- that's not
20 something that you've got a pile on your desk to look
21 at their programming to see what you should be doing?

22 A Generally, no.

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1 Q How about WGN? Is that another -- is that
2 a superstation you might want to counterprogram?

3 A No. I don't believe that WGN has
4 significant carriage in the New York City market.

5 Q And is that because WPIX does?

6 A I don't know what the decisionmaking
7 process is among the cable operators to decide which
8 imported superstations to bring into the market.

9 Q You carry a syndicated show called Family
10 Matters, right?

11 A Correct.

12 Q And that's shown on WPIX in the New York
13 area?

14 A Yes.

15 Q Do you know whether it is also shown on
16 WTBS?

17 A I believe it is also shown on WTBS.

18 Q When you were purchasing and scheduling
19 Family Matters, it didn't matter to you whether or not
20 WTBS was showing it at the same time or a different
21 time?

22 A The purchase of Family Matters occurred

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1 prior to my tenure at WPIX.

2 Q But you still can schedule Family Matters?

3 A Yes.

4 Q Do you schedule Family Matters without
5 regard to what WTBS is doing?

6 A Pretty much.

7 Q Well, did the show succeed?

8 A Family Matters?

9 Q Yes.

10 A Yes.

11 Q And do you know, is it programmed at the
12 same time as TBS?

13 A There have been times, I believe, when
14 WTBS and WPIX have shown Family Matters at the same
15 time.

16 Q Going back to the Yankees for a moment,
17 are you aware of a requirement by Major League
18 Baseball that the stations who carry the teams -- who
19 have contracted to carry the teams locally that happen
20 to be superstations pay an additional fee to Major
21 League Baseball?

22 MR. GARRETT: Mr. Chairman, Bob Garrett,

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1 Joint Sports Claimants. Can I ask where in the
2 written testimony of Mr. Graff Mr. Seiver is now
3 questioning?

4 MR. SEIVER: I don't have that in the
5 direct testimony, Your Honor. I'm talking about
6 sports programming generally, and I'm trying to
7 determine whether or not their programming decisions
8 and the money that is spent work into this mix, and
9 I'm just trying to find out if, by virtue of the fact
10 that there's superstition carriage, there's an
11 additional fee for any programming. And if he doesn't
12 know, then I'll move on. If he does, you know --

13 CHAIRMAN GRIFFITH: All right.

14 Mr. Garrett?

15 MR. GARRETT: Mr. Chairman, my
16 understanding is that cross examination is limited to
17 direct examination. Mr. Seiver has -- this is not
18 part of the scope of direct examination.

19 Furthermore, we had a sports witness here
20 the other day. If Mr. Seiver was interested in
21 finding out what sports interests do, he should have
22 asked our witness and not the witness for one of the

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1 other claimants here.

2 I think it's inappropriate to be raising
3 these questions with Mr. Graff, because it is beyond
4 the scope of his direct, and secondly, because he is
5 not the appropriate witness. Mr. Seiver had his
6 chance. He should have used it then.

7 CHAIRMAN GRIFFITH: Okay. The objection
8 is sustained.

9 BY MR. SEIVER:

10 Q In the acquisition of any of your
11 programming, do you pay a premium -- besides sports --
12 to any syndicator or seller of programming for the
13 fact that WPIX is carried nationally?

14 A No.

15 Q So it costs you no additional money to
16 produce and acquire your programming by virtue of the
17 fact that United Video or Superstar sells your signal
18 elsewhere in the country?

19 A No.

20 Q Now, I understand also from your testimony
21 that you're not really aware of the copyright royalty
22 rates that are paid for superstition carriage that are

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1 paid here. Do I take it, then, do you have any
2 understanding about whether -- about how those
3 royalties are divided?

4 A Not really.

5 Q Do you know whether or not you, as a
6 broadcast station, have the right to come into this
7 building and participate in a proceeding and get --
8 try to get some of those funds?

9 A Well, I'm here.

10 Q But you know this is not a distribution
11 proceeding, isn't that right? This is not for you to
12 get additional funds?

13 A I'm just here to talk about my experience
14 in programming a local TV station.

15 Q And you yourself are not asking for or
16 promoting any change in those royalty rates that are
17 paid in?

18 A I'm here just to testify.

19 Q As to what you've testified in your
20 direct?

21 A Right.

22 Q We've been talking about the value of the

1 scheduling and programming information, that the
2 carriers are freed from the burden and expense of
3 doing it on their own. I want to talk a little bit
4 about the programming information.

5 You do provide advanced notice of your
6 program schedule to publishers of the satellite
7 television guides, do you not?

8 A Correct.

9 Q And do they pay you for that?

10 A Not that I'm aware of.

11 Q Do you benefit, then, from that?

12 A We do it as a service to them. Since they
13 are carrying our signal to the home dish owner, we
14 feel it would be -- it just wouldn't make sense not to
15 let that home dish owner know where he can watch
16 programs on our station and which programs he can
17 watch when.

18 Q I think we might have confused two
19 separate issues. I want to make sure I understand it.
20 I had asked you whether you were giving it to the
21 guides, the people that publish them -- Orbit, for
22 instance, where you got your program information.

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1 A Right.

2 Q Orbit is not a satellite carrier?

3 A No.

4 Q But you provide it to Orbit?

5 A Right. Correct.

6 Q Do you also provide it to the carriers?

7 A No. I was -- we just provide it to Orbit,
8 as far as I know. I don't know that we send a regular
9 schedule to the satellite -- actually, I'd have to
10 check with my staff to see if they do provide a
11 schedule to the Satellite Carriers in addition to the
12 schedules that are provided to the listing services.

13 Q Your testimony, then, is you don't know.
14 You may provide it to the Satellite Carriers?

15 A We may.

16 Q Well, let me ask you -- I'm going to mark
17 as Exhibit 11X --

18 (Whereupon, the above-referred
19 to document was marked as
20 Exhibit No. SBCA 11-X for
21 identification.)

22 CHAIRMAN GRIFFITH: I think the rule says

1 to provide it to counsel before you provide it --

2 MR. SEIVER: I'm sorry.

3 CHAIRMAN GRIFFITH: Thank you.

4 JUDGE GULIN: Mr. Seiver?

5 MR. SEIVER: Yes?

6 JUDGE GULIN: Have you got another copy?

7 MR. SEIVER: I'm sorry.

8 BY MR. SEIVER:

9 Q Mr. Graff, I asked you to take a look at
10 what has been marked as Exhibit 11X, and ask you is
11 this a familiar looking document to you?

12 A Yes.

13 Q Do you know whether or not this particular
14 document has been faxed to Superstar or United Video?

15 A It may have been.

16 Q It wouldn't surprise you?

17 A No.

18 Q And this is an advance listing, is it not,
19 if you can read at the top there, does it say
20 "February 28, 1997, 2:02 p.m."? Do you see that?

21 A Yes.

22 Q And Sunday, March 23rd is --

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1 A Yes.

2 Q -- approximately three weeks subsequent to
3 that?

4 A Yes.

5 Q So this is -- you've already planned out
6 your --

7 A Broadcast program.

8 Q -- program day for these straight on
9 through?

10 A Yes.

11 Q And do you know whether Superstar has ever
12 done any promotions in its advertising based on the
13 program material that you may have sent them?

14 A I believe that they have.

15 Q So I guess if they have, then we can
16 clearly assume that information such as this has been
17 provided to them?

18 A Yes.

19 Q And you just don't know whether it's
20 routine, every month, or --

21 A Well, from looking at this, obviously,
22 it's -- this is part of our routine transmission of

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1 programming information. So it goes out to -- if this
2 did come from UVTV, then we provide it to them on a
3 routine basis.

4 Q Tell me this: if -- I'm sorry. And
5 you're not aware of Superstar sending you a check for
6 -- and I believe your testimony was before is you
7 thought, "Oh, well, as long as your station is out
8 there, you might as well let the viewers know what's
9 on"?

10 A Yes.

11 Q Earlier, we had been testifying that
12 merely the existence -- and tell me if I'm wrong in
13 characterizing this -- of the satellite and cable
14 viewers wasn't really relevant to you in making your
15 programming decisions?

16 A The fact that they're not relevant when
17 we're making program decisions, which are specifically
18 -- well, the fact that they're not relevant when we're
19 making programming decisions doesn't mean that they're
20 completely negligible when we are broadcasting our
21 programming.

22 Q So if they're not completely negligible,

1 what are they?

2 A They have a certain significance; hence,
3 are supplying the programming information to Orbit and
4 to the Satellite Carriers.

5 Q And what is that certain significance?

6 A I don't know if I could put that into
7 words, exactly what it is.

8 Q In this proceeding, and I know you're not
9 an expert witness on valuation, have you come to learn
10 what it is that this Panel is supposed to put a value
11 on at the end of the day, the week, or the six months
12 of the presentation of evidence?

13 A I believe it's on the value of the various
14 -- well, as far as I'm -- my particular area and the
15 value of the services that the superstations are
16 offering.

17 Q Have you heard the term "secondary
18 transmission"?

19 A I don't know what it means.

20 Q Well, have you heard the term?

21 A I can't place it in any context.

22 Q And how about primary transmission?

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1 A Same thing. I can't place it in any
2 context.

3 Q When you purchase programming and then you
4 broadcast it out from your antenna, I don't know if
5 it's -- is it in New York City?

6 A Yes.

7 Q We've been kind of alluding to Manhattan.
8 You don't charge viewers within Manhattan or the New
9 York DMA to watch your programming, is that right?

10 A Viewers who receive us over the air on
11 antenna do not pay any sort of fee.

12 Q To you.

13 A To us.

14 Q Do you know if viewers who receive it over
15 a cable system in the New York DMA pay WPIX anything
16 for the privilege of --

17 A I don't know what our arrangement is with
18 the cable systems. That's really outside of my
19 purview.

20 Q You don't know whether there is a similar
21 copyright payment as there is in satellite or not?

22 A Yeah, I don't know if there is a

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1 retransmission fee or whatever it might be called,
2 that we get from cable systems.

3 Q You bring up retransmission. Are you
4 familiar with the term "retransmission consent"?

5 A Yes.

6 Q Has WPIX granted retransmission consent to
7 New York DMA cable systems?

8 A I don't know. That's not an area that I
9 deal with.

10 Q Someone else at WPIX --

11 A Yes.

12 Q But I presume, since, you know, it's
13 carried on cable systems, something must have
14 happened, something like this?

15 A Yes.

16 Q But you do know what the cable carriage is
17 in the New York area?

18 A Yes.

19 Q Do you know if there was any payment made
20 for the retransmission consent?

21 A I don't know.

22 Q And nobody came over to you in programming

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1 and handed you a check and said, "We've got this extra
2 money. Go out and get some more programming"?

3 A No.

4 Q When you are selling -- no, I'm sorry.
5 Let me start over. In your business of making the --
6 I will refer to it as the primary transmission being
7 the signal emanating from your antenna available --
8 the importance to you is to maximize the number of
9 viewers, so you can maximize your rates that you
10 charge your advertisers, is that right?

11 A That's correct.

12 Q And ratings are important because not only
13 do you maximize the viewers that can get it, but that
14 are actually watching your programming?

15 A Could you state that again? I --

16 Q I'm sorry. I didn't mean to say it so
17 fast. I was trying to reestablish it.

18 You obviously want to have as many
19 potential viewers as you can, but your ratings for
20 your particular shows are important because then you
21 can show the advertisers that this many people are
22 actually watching?

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1 A That's correct.

2 Q Or this percentage of people with
3 televisions on. Isn't that called a share --

4 A Yes.

5 Q -- are actually watching your programming?

6 A Yes.

7 Q When you are acquiring your programming
8 from syndicators, or whomever, do you look then at
9 ratings that programming may have elsewhere in making
10 your determination as to what to pay?

11 A Yes, that is one of the factors generally
12 involved.

13 Q And when you're buying the programming
14 from these particular programmers or syndicators, do
15 they look at you and say, "Well, I want to see what
16 your reach is in the New York market, and how your
17 other programming has been doing," in order to set a
18 fee?

19 A It depends on the type -- on the method of
20 distribution of the programming. If it's a series
21 that is being sold strictly for cash, where there is
22 no national barter time that is sold within the

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1 programming kept by the syndicator for his use to sell
2 after he has distributed the program around the
3 country, it is strictly a matter of dollars. You
4 could be a very weak station with a very weak reach
5 within the market, and yet if you come up with a
6 higher license fee than any of your competitors, you
7 generally will buy that -- you will purchase that
8 program.

9 If it's a program, on the other hand,
10 where there is no cash taking -- changing hands, but
11 the entire consideration is the advertising time that
12 the local station gives up to the syndicator for his
13 sale of the national advertising within that program,
14 then the strength of the station and the quality of
15 the time period parameters within which they agree to
16 run that program is the value that they trade for the
17 show.

18 If it's a hybrid where there's cash plus
19 a certain amount of national barter time, then
20 generally -- then both factors will take place.

21 Q How is Family Matters sold? In which of
22 the --

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1 A Family Matters was initially sold strictly
2 as a barter program for its first two years, and the
3 subsequent license period has been strictly cash.

4 Q So Family Matters -- the selling of that
5 doesn't -- that programmer doesn't care that WTBS may
6 be showing that as well?

7 A What programming?

8 Q Whoever is the syndicator selling you
9 Family Matters.

10 A Oh, I'm sure they do care that WTBS shows
11 it, because they're getting a license fee from WTBS.

12 Q I'm sorry. Yes. But as far as what the
13 fee is for you, that doesn't work into the equation?
14 Does it reduce the value? I'm saying to you: can you
15 say, "Well, I'm not going to pay you as much for
16 Family Matters because TBS is right here with it"?

17 A I would say that the lack of exclusivity
18 can be a factor in the cost of programming.

19 Q Looking at Exhibit 11X -- and I didn't see
20 Family Matters on there. I know that you carry it.
21 I'm not going to try and find it. But just looking
22 down the types of programs that you have listed, and

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1 I'm not going to go through them all, I'm just going
2 to ask you a couple of questions --

3 A You can find Family Matters, by the way.
4 It is on there.

5 Q Oh, it is?

6 A Yes.

7 Q I'm sorry. And so that the record is
8 clear, is it the third page?

9 A Yes.

10 Q At what time?

11 A 7:30 p.m.

12 Q 7:30

13 Also, I noticed you have the CC in parens.
14 Is that for closed captioning?

15 A That's correct.

16 Q And did you make a press release, I
17 believe in the last year, that you are closed
18 captioning all of the programming?

19 A I don't know exactly what the press
20 release said as far as closed captioning is concerned.
21 I know it dealt with, I think, all of our local -- our
22 news is closed captioned.

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1 Q Do you know if you sent that press release
2 on to Superstar for them to publish to their --

3 A I don't know. I don't distribute press
4 releases.

5 Q Just looking on the first page, then, at
6 2:00 p.m. -- and I don't know why I'm picking this one
7 -- but Xena, Princess Warrior --

8 A Yes.

9 Q -- who do you buy that from?

10 A From Universal Television.

11 Q Universal Television. And when you made
12 the deal with Universal Television, did you get
13 national non-exclusive rights for that programming?

14 A Our rights for that programming are
15 exclusive within our market.

16 Q Just within the New York DMA?

17 A Yes.

18 Q The exception would be that Xena is
19 carried by some of the other Tribune stations?

20 A That's correct.

21 Q To the extent WGN is carried in the New
22 York DMA, would there be a blackout requirement?

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1 A I don't know that we would require cable
2 systems that we would have filed for syndicated
3 exclusivity on that on that program.

4 Q Well, I guess WGN is a sister station, so
5 you're not quite as upset about them as you might be
6 about WTBS.

7 A I think "upset" isn't quite the correct
8 characterization.

9 Q So you just had the exclusive rights to
10 the New York DMA. Do you have any national rights at
11 all when you make your deal with -- I'm sorry, I
12 forgot the --

13 A Universal Television.

14 Q -- Universal Television?

15 A No. It's strictly for the New York
16 market.

17 Q Do you know who Jerry Parker is, by the
18 way?

19 A No, I do not.

20 Q Okay. Jerry Parker is from Superstar
21 Satellite Entertainment, and he has been here for four
22 days. And as you know, Superstar sells WPIX and the

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1 other stations. You're aware that Superstar does
2 that, right?

3 A I am now.

4 Q If Mr. Parker, who does programming
5 contracts, came to New York and visited you and said,
6 "You know, Bill, we'd really like to put Xena out on
7 the direct feed. Can you license us to have Xena as
8 a separate item on a separate channel?" would you be
9 able to legally do that?

10 A I don't believe our broadcast rights
11 extend to that.

12 Q And I'm not trying to trap you or
13 anything. And you don't understand, then, how your
14 broadcast signal, which is only cleared for the New
15 York DMA, is then distributed nationally without some
16 further intervention of some entity, am I right?

17 A No, I'm not that familiar with the
18 mechanics of it.

19 Q So suffice it to say that at least in a
20 market negotiation, you wouldn't be able to -- you
21 don't have the rights to sell to Superstar to carry
22 Xena nationally?

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1 A Correct.

2 Q Do you have any national rights for -- you
3 can look at these, and if you need a moment, do it --
4 for any of the programming that's in your program day?

5 A When you say "national rights," are you
6 referring specifically to the ability to allow a
7 satellite system to pluck a particular program off of
8 our air and retransmit it on another channel at
9 another time?

10 Q Yes, to a satellite viewer. Yes.

11 A To a satellite viewer.

12 Q That's what I meant. Exactly.

13 A I know that we own the copyright to
14 channel 11 news. So I don't know to what extent we
15 could offer that as a separate service.

16 Q You don't know how your contracts are?
17 You do own -- I'm sorry. Let me start all over again.
18 You're the registered copyright owner yourself? And
19 when I say "yourself" I mean --

20 A WPIX.

21 Q -- for the news. Putting the news aside,
22 all of the syndicated programming and movies and the

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1 sitcoms and talk shows, all of that is pretty much not
2 produced by you and by others?

3 A That's correct.

4 Q You had been testifying earlier about your
5 unique value or unique on-air appearance in the New
6 York area, is that right?

7 A Yes.

8 Q Is part of that due to the fact that
9 you're a Warner Brothers network, WB?

10 A Yes. Affiliate.

11 Q WB, I'm sorry, affiliate.

12 And, in fact, you actually promote it on
13 your program listing. It's WB11?

14 A That's correct. That is the logo of the
15 station.

16 Q Does that appear -- WB11 -- in the lower
17 right-hand corner like some of the networks do when
18 they put the I or the PI --

19 A Yes, it does.

20 Q And even though it does say WPIX program
21 listing, when you do your generally viewed
22 advertisements, do you promote yourselves as WB11?

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1 A In promotional advertising?

2 Q Yes.

3 A Yes.

4 Q Do you know if WGN is also a Warner
5 Brothers affiliate?

6 A Yes, WGN -- I know that their satellite
7 signal is. And yes, within Chicago, they are also a
8 WB affiliate.

9 Q Do you know whether KTLA is a WB --

10 A KTLA is a WB affiliate.

11 Q And how about KWGN?

12 A And KWGN is a WB affiliate.

13 Q So four of the superstations are WB
14 affiliates?

15 A Yes.

16 Q And do you know whether the programming
17 that you carry as a WB affiliate overlaps or
18 duplicates programming carried by any of the other
19 three WB affiliates owned by Tribune?

20 A You are talking about WB network
21 programming specifically?

22 Q Yes, WB network programming specifically.

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1 A They run at different times.

2 Q Well, let me ask you: for example, WB11
3 runs a 10:00 news?

4 A That's correct.

5 Q Do you know whether WGN, which is in the
6 central time zone, runs a 9:00 news?

7 A Yes, they do.

8 Q And that would be seen in the New York
9 area where you work at 10:00, the same time --

10 A Yes.

11 Q -- as WPIX news?

12 A Yes.

13 Q Do you know whether any of the other WB
14 programming on KTLA would appear at the same time,
15 because of the time zone differentials, as WPIX
16 programming?

17 A I would think that all of it would appear
18 at different times in WPIX, essentially three hours
19 difference.

20 MR. SEIVER: I'd like to mark as
21 Exhibit 12X a document which I will explain in a
22 moment.

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(Whereupon, the above-referred to document was marked as Exhibit No. SBCA 12-X for identification.)

BY MR. SEIVER:

Q I guess, first, Mr. Graff, I'd ask you if you've ever seen this document before.

A No, I have not.

Q Have you ever seen this type of document before? When I say "this type," I mean something that shows a grid of comparison of -- do you understand it to be the program day for the three --

A Yes.

Q -- different stations?

A Yes, I do.

Q Have you ever seen something like this that compares the programming?

A Not of stations from different markets, but I've seen it from -- this would -- the industry term for this is a comparagraph.

Q Comparagraph?

A Yes.

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1 Q So this is something that's routinely done
2 for --

3 A For local markets. That way you can see
4 who is running what when.

5 Q And if you look at just here on this
6 weekday schedule, the first page, the 7:00 -- I guess
7 it's Bugs 'N Daffy on WGN is actually at the same time
8 as the WPIX Bugs 'N Daffy?

9 A Yes.

10 Q And further down, where it says 7:00, WGN
11 is running -- it says movie or WB, and WPIX also is
12 running WB or a movie?

13 A On nights that there would not be the WB,
14 the movies would not be the same.

15 Q But on the nights they are WB, they would
16 be the --

17 A It would be the same WB network
18 programming.

19 Q And then, also at 9:00 you have the WGN
20 news at 9:00, and then corrected for the eastern time
21 that would mean WPIX's news at 10:00 is at the same
22 time?

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1 A Yes.

2 Q And also you'll notice that there is some
3 time shifting -- for example, at 3:00, Beverly Hill
4 90210, and also at 4:00 on WPIX?

5 A Yes.

6 Q In your testimony previously as far as
7 your unique status, do you think the fact that, at
8 least as far as superstation distribution is
9 concerned, this overlap or duplication, to the extent
10 that it is shown here, diminishes the value of the
11 programming that is on your particular signal to the
12 satellite carrier?

13 A I would say that the duplication is so
14 minor -- the vast majority of all three schedules, as
15 is evident by just glancing at it, are different
16 programs running at different times. And at any one
17 time, you can catch -- there are three different
18 programs available on the three stations.

19 It's similar to cable networks where
20 several of them own Bugs Bunny cartoons, and you can
21 catch Bugs Bunny cartoons on TNT or TBS or
22 Nickelodeon, yet they're on at different times. And

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1 I don't think that that has reduced the carriage of
2 those three networks on cable systems.

3 Q The time shifting aspect of this -- for
4 instance, like Seinfeld I guess -- it says
5 Seinfeld/Cheers at 1:00 on KTLA, you think is not
6 really relevant to Seinfeld and Cheers being at 10:00
7 or 10:30 on your station?

8 A No. I think it's -- well, for one thing,
9 if it's Seinfeld or Cheers, it may -- if it's Cheers,
10 it's a different program.

11 Q Right.

12 A Seinfeld, which may -- which is day/date
13 -- it is distributed by Columbia -- still would be
14 available at, you know, two different times on the two
15 stations, making it more convenient for the
16 subscriber.

17 Q So you don't think the time shifting
18 diminishes the value?

19 A No, not at all.

20 Q And as far as the overlap, you think it's
21 minimal to the extent that it doesn't diminish value
22 to the carrier?

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1 A Yes. I would say that the overlap is
2 minimal.

3 Q Do you know when WPIX became a Warner
4 Brothers affiliate? Was that on your watch -- I mean,
5 when you were there?

6 A Oh, no. I don't have a Bugs Bunny watch,
7 so I --

8 (Laughter.)

9 Q I would ask you for one if you did.

10 (Laughter.)

11 A No, this happened prior to my tenure.

12 Q And do you know whether it happened
13 subsequent to United Video and Superstar carrying WPIX
14 as a satellite superstation?

15 A I would think that we were carried before
16 we were a WB affiliate.

17 Q And would you know whether that's the same
18 for WPIX and KTLA -- I mean --

19 A WGN.

20 Q -- WGN and KTLA?

21 A I believe so, but I haven't seen a hard-
22 and-fast timeline that tells me that for a fact.

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1 Q But as far as -- and we know that they're
2 all commonly owned, right?

3 A Yes.

4 Q Tribune owns all of these, and for
5 whatever reason it is creating, you know, the same WB
6 status for its -- would you call yourself a flagship
7 station of Tribune in the major markets?

8 A Yes.

9 Q So we have Los Angeles, Denver, Chicago,
10 and New York owned by the Tribune. And all are WB
11 affiliates?

12 A That is correct.

13 Q When you speak of -- and you did this on
14 page 2 -- when you say you choose to schedule your
15 programs to be consistent with the overall image that
16 you described before, "and strive to distinguish
17 ourselves from other stations," I take it, then, that
18 distinguishing factor more applies to your DMA rather
19 than to the other superstations?

20 A Our primary concern is to distinguish
21 ourselves among other stations in the New York market.

22 Q Are you concerned at all about the

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1 duplication or time shifting or overlap of programming
2 between you and your sister stations of Tribune?

3 A I wouldn't say that it's a motivating
4 factor in my decisionmaking process, no.

5 Q You wouldn't look at this -- I'm sorry --
6 it's called a comparagraph?

7 A Yes.

8 Q You wouldn't look at a comparagraph and
9 say, "I've got to move one particular program
10 somewhere else, or change this," in order to
11 maximize --

12 A Once again, since our revenue source is
13 based on the ratings that we get in the New York
14 market, and neither of these stations have -- neither
15 WGN nor KTLA has any significant presence in the New
16 York market, we do not look to their schedules when
17 deciding how to construct our schedule.

18 Q Now, if Mr. Parker called you up and --
19 well, let me ask something. Do you know -- have
20 people from United Video or Superstar ever come to
21 tour or meet you at your station?

22 A Yes, United Video. I've met a couple of

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1 people from there.

2 Q More than once?

3 A More than once.

4 Q Have you been to their facilities in --

5 A No, I have not.

6 Q Do you know why you invited them to New
7 York?

8 A I was not the one who invited them. I was
9 involved in a meeting with them.

10 Q Do you know who did invite them?

11 A No, I do not.

12 Q Were people at your level, higher, below
13 you at those meetings?

14 A At my level and higher.

15 Q President of the station, or the general
16 manager? Is that what he's called?

17 A The general manager probably was at least
18 at one of those meetings.

19 Q Do you know if anybody from Tribune itself
20 was present at those meetings?

21 A Not that I recall from Tribune being
22 outside of the TV station WPIX.

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1 Q I'm sorry. I'm under the assumption that
2 there is someone from Tribune -- is it Michael Eigner?

3 A Yes.

4 Q He is --

5 A He is the Executive Vice President and
6 General Manager.

7 Q But his office is in New York?

8 A Yes, that's right.

9 Q And is it in the same office area as you?

10 A Yes.

11 Q I see. And during those meetings, do you
12 know if superstition carriage was discussed?

13 A Yes.

14 Q And can you tell us a little bit about the
15 discussions that you had?

16 A Probably it was a State of the Union type
17 of presentation. To my recollection, it was -- they
18 gave us the figures of -- "Here is where you're
19 carried. Here is where there may have been some
20 drops." It was an informational meeting, really.

21 Q Did that information help you at all in
22 making your --

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1 A No.

2 Q -- programming decisions?

3 A No.

4 Q If Mr. Parker at one of those meetings
5 said, "You know, I really want you to move Murphy
6 Brown out of that slot," would you?

7 A No.

8 Q He has no contract with WPIX, is that
9 right?

10 A No.

11 Q Nothing directly. If Mr. Eigner told you
12 to move it out of that slot, you would?

13 A In a heartbeat.

14 (Laughter.)

15 MR. SEIVER: Your Honor, I have probably
16 another 45 minutes to an hour. Would this be a good
17 time for the morning break?

18 CHAIRMAN GRIFFITH: Okay. We'll take our
19 morning recess at this time then, about 10 or 12
20 minutes.

21 (Whereupon, the proceedings in the
22 foregoing matter went off the record at

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1 11:25 a.m. and went back on the record at
2 11:45 a.m.)

3 CHAIRMAN GRIFFITH: Mr. Seiver?

4 MR. SEIVER: Thank you, Your Honor.

5 CROSS EXAMINATION

6 BY MR. SEIVER:

7 Q Mr. Graff, I just wanted to tie up one
8 other loose end.

9 When we were looking at the programming
10 and we were looking at all the different -- not the
11 comparagraph, the other exhibit.

12 A Yes.

13 Q If you had just paged through and looked
14 at a particular week here, which is what we have, how
15 many different program providers or syndicators do you
16 think you have contracts with or negotiations with?

17 A Oh, I would say at least 25.

18 Q Twenty-five.

19 And these negotiations are ongoing. As
20 you change your --

21 A Right, as programs -- when you purchase
22 programs, it's for a set number of runs over a set

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1 number of years. And as programs expire, you either
2 replace them or remove them.

3 Q So you're a pretty busy man just on a
4 daily basis dealing with programmers and renewals and
5 contract rights and --

6 A Among a lot of other things, yes.

7 Q In addition to scheduling, your
8 negotiations with the programmers is a --

9 A Uh-huh.

10 Q Would you say it's intense at times?

11 A At times. Not -- I do not personally
12 acquire all the programming for WPIX by any stretch of
13 the imagination.

14 Q Others --

15 A Others --

16 Q Well, we talked about the Yankees.
17 Somebody else does that?

18 A Right. And the general manager is
19 involved. There will be certain programs I'll conduct
20 negotiations for up to a point; other programs I'll
21 conduct negotiations for after it's reached a certain
22 point and I'll close them.

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1 There are other programs that are acquired
2 for WPIX on a multi-station basis where we have a
3 Tribune --

4 Q The Tribune's doing the negotiating?

5 A They're doing the negotiating in direct
6 contact with us as far as price and terms. They work
7 with us. We're not given something as a fait accompli
8 that we're not -- that we haven't bought off on.

9 Q Have you -- I'm sorry, are you finished?

10 A I am finished.

11 Q Have you ever felt -- I don't know what
12 word would be best, and I'll let you choose or agree
13 or disagree. Have you ever felt handicapped in
14 negotiating with programmers because of your status as
15 a super station?

16 A No.

17 Q Have you ever found that the super station
18 status has enhanced your ability to negotiate with
19 programmers?

20 A No.

21 Q No effect?

22 A No effect.

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1 Q Are you --

2 MS. WOODS: I'm sorry, Your Honor.

3 I can't hear the questions.

4 MR. SEIVER: Am I really speaking that
5 quietly today?

6 I'll pick it up.

7 CHAIRMAN GRIFFITH: Thank you.

8 MR. SEIVER: Did you hear that last
9 sentence?

10 MS. WOODS: No.

11 MR. SEIVER: I will endeavor to repeat it.

12 I had asked Mr. Graff if in fact the
13 status of the super station had an effect on his
14 ability to negotiate, and I tried it as a handicap or
15 as an enhancement, and he said really no effect at
16 all.

17 Am I right?

18 THE WITNESS: That's correct.

19 CHAIRMAN GRIFFITH: The last thing was
20 really a cough.

21 (Laughter.)

22 MR. SEIVER: I'll speak up.

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1 BY MR. SEIVER:

2 Q Mr. Graff, are you under -- do you
3 understand the difference between the differing -- two
4 differing satellite technologies now that are
5 prevalent for delivering signals to the home?

6 A You're talking about DBS and C-band?

7 Q Right; C-band is -- we call it HSD
8 sometimes or home satellite dish.

9 A Right.

10 Q DBS is direct broadcast satellite, and
11 that's the -- do you understand that's higher power,
12 smaller dish?

13 A I understand that.

14 Q And that's the latest and greatest, most
15 popular technology; you read about it in the news and
16 --

17 A Yeah, I'm aware of it. I don't know if I
18 would characterize it the way you've characterized it.

19 Q Well, do you read ^{Broadcasting & Cable?}

20 A Yes.

21 Q And they just had a big cable versus DBS
22 banner on their latest edition?

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1 A I didn't get a chance to read this past --
2 I was traveling.

3 Q Do you -- to come here.
4 Do you understand that DBS is digital?

5 A Yes.

6 Q And digital is a better picture, isn't it?

7 A My understanding is it is a clearer
8 picture.

9 Q And hasn't WPIX invested in digital
10 equipment itself?

11 A I'm not involved in equipment purchases or
12 engineering decisions that are made, so I really
13 couldn't speak to that area.

14 Q You're not aware of any recent promotional
15 statements that have been made about WPIX being the
16 first one to get Sony's digital satellite transmission
17 system?

18 A I'm not aware of that promotional -- that
19 promotional announcement, no.

20 Q Are you involved with the production of
21 the news programs?

22 A Not at all.

1 Q So if someone was to get a -- something
2 that would be used for the news, a digital Sony beta
3 cam or whatever, that would be something that probably
4 wouldn't --

5 A Really would have no effect on me.

6 Q But you do agree that digital is -- at
7 least your understanding is it is a better picture?

8 A Yes.

9 Q Do you know whether in the DBS market all
10 of the programming that's delivered to the satellite
11 dish owner is digital?

12 A My understanding is that it is.

13 Q And you understand also that at least as
14 of now one of the DBS providers does include WPIX in
15 its package of programming that's delivered to the
16 dish owners -- to DBS owners?

17 A I don't know who that is.

18 Q EchoStar; does that sound --

19 A They -- I'm not aware of -- this is news
20 to me.

21 Q Well, I think that I won't hear an
22 objection from anyone if I tell you that EchoStar does

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1 carry --

2 A Okay.

3 Q -- WPIX.

4 A Sure.

5 Q And consistent with our other testimony,
6 that's not something that you really pay that much
7 attention to?

8 A Correct.

9 Q Although, you are generally familiar with
10 DBS and digital transmission?

11 A Uh-huh.

12 Q You had talked on page three of your
13 testimony about the value added by station programmers
14 such as yourself who put together schedules of
15 individuals programs.

16 Do you see that at the top?

17 A Yes.

18 Q Make the most useful to satellite
19 subscribers.

20 A digital picture delivered to satellite
21 subscribers would also be a "value added" aspect of
22 delivery of television, wouldn't it?

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1 A Only in that -- only if it was unique or
2 exclusive in some way compared to every other signal
3 that they're receiving. If the general format of what
4 they're receiving is digital, then there really is no
5 additional value to having any one particular signal
6 digital.

7 Q So the overlap of programming between
8 multiple signals that a dish subscriber may get is not
9 really a problem; but if they're all digital, then you
10 do think that that's really -- there's no additional
11 value for WPIX?

12 A No, no; I'm saying that the fact that a
13 DBS company would have to digitize our signal, if
14 they're getting our signal on an analog basis and make
15 it digital, is not adding any value to our signal that
16 isn't already added to every other signal that they're
17 delivering.

18 So in essence, if all values are equal,
19 there's no value.

20 Q So they --

21 A There's no particular value, I should say.

22 Q There's no relative -- there's value

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1 added; but relative to the others, it's no more or no
2 less than the others?

3 A Correct.

4 Q But based on your analog, if you have a
5 DBS subscribers -- let's say they manage to be in the
6 New York DMA and they have their EchoStar dish out
7 there and they can get WPIX over the air over WPIX on
8 their dish, the relative value there would be
9 increased if they can watch a clearer picture?

10 A Than they could watch over the air?

11 Q Yes.

12 A Yes.

13 Q Thank you.

14 A If indeed there are EchoStar subscribers
15 in the New York DMA.

16 Q And that you have no knowledge of?

17 A I have no knowledge of.

18 Q You are aware of EchoStar's and ASkyB's
19 proposals that have been in the press recently?

20 A Yes.

21 Q And have you made any analysis or review
22 of the increase or change in the DBS marketplace as a

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1 result of that announced merger?

2 A My understanding is that there are
3 significant technological and legal hurdles to that
4 merger accomplishing what they've stated they wish to
5 accomplish.

6 Q I'm not going to go into that -- about the
7 local signals?

8 A Yes.

9 Q I'm not going to go into that.

10 But suffice it to say, as it stands right
11 now, your signal can be retransmitted within the New
12 York DMA. Whether you have it there over the air or
13 it's on -- over a cable, it doesn't matter; there's no
14 restriction on a satellite carrier bringing WPIX back
15 into your DMA?

16 A I'm not conversant with the laws covering
17 that.

18 Q You don't know what the laws are with
19 respect to network affiliates?

20 A Correct.

21 Q And the limitations or restrictions?

22 A Right.

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1 Q You also mentioned in this page three that
2 the carriers are freed from the burden and expense of
3 creating and scheduling their own channels. I want to
4 focus on this burden and expense. And I think I
5 managed to get you to agree that there is some
6 relative value that the digital signal has over your
7 -- over your analog signal.

8 A Only in the very narrow specifications of
9 a digital signal being available in my market.

10 Q That's all -- you don't care that it's out
11 of your market?

12 A Right.

13 Q So that if someone's getting an over the
14 air signal of let's say WTBS in the Atlanta market and
15 they get their dish and all of the sudden they get
16 WPIX digital, that's of no consequence to you?

17 A As far as I'm concerned, no.

18 Q The burden and expense of creating and
19 scheduling -- do you see that the satellite carriers
20 have assumed the burden and the expense of receiving
21 the signals off air, building an uplink, renting a
22 transponder, marketing, authorizing -- is that

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1 something that you see as a contribution of the
2 satellite carriers to the distribution of WPIX?

3 A Those are the satellite carriers' --
4 that's their method of doing business. Whatever value
5 there is in WPIX being available in households outside
6 of the New York DMA and the fact that satellite
7 distributors have made capital investments to allow
8 that to occur; yes, there is.

9 Q But that distribution out of the New York
10 DMA is, you said, not of value to you?

11 A Not of any measurable value that I --

12 Q But you presume it is valuable --

13 A To them.

14 Q -- to the carriers?

15 A Yes.

16 Q And do the carriers just sell the super
17 stations, do you know, or do they sell other
18 programming?

19 A I'm sure they sell other programming in
20 addition to just super stations.

21 Q Have you looked at any of the packages to
22 see what cable networks or other super stations --

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1 A No.

2 Q -- or network stations are?

3 A Other than the local stations -- you know,
4 the super stations, I haven't really examined which
5 cable networks or other stations are available.

6 Q Are you a cable subscriber?

7 A Yes, I am.

8 Q I presume you're not a dish subscriber?

9 A I am not a dish subscriber.

10 Q And you buy your programming in packages?

11 A Yes.

12 Q A basic tier, expanded basic?

13 A Yes.

14 Q So you understand the concept of
15 packaging?

16 A Uh-huh.

17 Q And you do understand that the satellite
18 carriers are also engaged in packaging then?

19 A Yes.

20 Q Do you know sitting here whether the
21 economics of a carrier's packaging of programming is
22 the same or different from the economics of a

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1 broadcast station's delivery of programming over the
2 air?

3 A I really don't know.

4 Q That's not within your purview.

5 Do you believe that there is any value
6 that's added by the satellite carrier to the expanded
7 carrying of your programming at all outside of the New
8 York DMA?

9 A Not any measurable value that I've seen.

10 Q And on page three, you have said that your
11 unique identity makes each station more promotable by
12 the satellite carriers; and I want to understand what
13 you mean by more promotable.

14 Could you explain that?

15 A Sure. As they are touting the services
16 and the packages that they offer, if a station has a
17 unique identity and offers a unique service to a
18 subscriber, it makes -- that dovetails with the
19 satellite carrier's promotion.

20 They're trying to convince their
21 subscribers to subscribe or to continue subscribing.
22 And in the same way I guess that cable systems will

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1 tout various of their cable networks that they offer,
2 the satellite carriers would do the same.

3 Q Do you understand that -- does this
4 promotion that the carriers go through, this
5 promotion, benefit you in any way?

6 A Not that I'm aware of.

7 Q And to your understanding, when you say
8 more promotable, WPIX is not the highest rated program
9 that is viewed by satellite subscribers to your
10 knowledge, is it?

11 A I would be very surprised if we were the
12 highest rated.

13 Q Do you know what some of the highest rated
14 cable networks are that distribute to the satellite
15 homes?

16 A Other than making an assumption that it
17 would be the similar ones on cable -- you know, USA,
18 TNT; and that's strictly an assumption on my part. I
19 haven't looked at any statistics.

20 Q But at least on the cable package, you're
21 aware that those that you just mentioned are among the
22 highest rated of the cable networks?

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1 A Yes.

2 Q And when you say more promotable, WB11 is
3 helping them to sell packages, you're also agreeing
4 that the fact that the package may include a USA or a
5 TNT also helps them sell a package, is that right?

6 A I'm sure. They aren't putting anything on
7 their packages that will devalue the package in their
8 eyes.

9 Q And in fact, if you look at -- on the next
10 page of your testimony, page four, you give some
11 examples -- well, could you refer to Exhibit 4 about
12 programs that have been broadcast?

13 A Yes.

14 Q And you talk about what's carried on WPIX,
15 and you mention shows for sports enthusiasts,
16 entertainment shows -- I'm sorry, I skipped over the
17 beginning ones.

18 "Regular news programs, other locally
19 produced shows, shows for sports enthusiasts,
20 entertainment shows, children's shows, documentaries,
21 minority interest programs, religious programs, and
22 magazine type shows."

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1 A Yes.

2 Q Are all these available on WPIX as well,
3 these types of programs?

4 A Yes.

5 Q Now all these types of programs are also
6 available on various cable networks, aren't they?

7 A Broadly, yes.

8 Q Well, for instance, news programs: we've
9 got CNN, Headline News, Fox News.

10 A But none of them offer news of interest to
11 people who are interested in the New York area
12 specifically.

13 Q You don't think any of those stations
14 carry any New York news at all?

15 A I think they carry some from a national
16 perspective, but not from a New York perspective.

17 Q How about -- what's Bloomberg?

18 A Bloomberg I think is a business news
19 service. I've never seen them more than in a cursory
20 way.

21 Q All right, and then shows for sports
22 enthusiasts; they're ones like ESPN and ESPN2, CCN,

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1 Sports Illustrated, CCN SI?

2 A We're the only ones that carry the New
3 York City marathon live. Also, we have carried about
4 50 Yankee games a year which are not on any of those
5 other services.

6 Q But other Yankee games are available on
7 other services besides the 50 that you carry, right?

8 A There would be an occasional Yankee game
9 on a national broadcast done on either Fox or ESPN.

10 Q Also, with the regional channels, are you
11 familiar with regional sports channels that operate
12 from the New York area?

13 A Yes.

14 Q Okay, and there's a number of them like
15 MSG?

16 A MSG or Sports Channel.

17 Q Sports Channel?

18 A Right.

19 Q Do they carry New York area sports teams?

20 A That's correct.

21 Q Entertainment shows -- I'm assume that
22 entertainment is a broad term in the -- almost every

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1 station is entertaining to some degree?

2 A Uh-huh; we hope so.

3 Q Children's shows -- PBS carries children's
4 shows, Nickelodeon, Cartoon Network?

5 A But they are -- the shows that Nickelodeon
6 carries are mainly exclusive to Nickelodeon. The PBS
7 shows are certainly exclusive to PBS stations.

8 WPIX has been the most watched children's
9 station in the New York market, and there seems to be
10 some level of acceptance that we have among children's
11 audiences and some ability to reach them. And that
12 can translate outside of the market also.

13 Q Well, that's -- you added that. I was
14 going to stop you before you got to that.

15 It seemed, as we were talking about this,
16 that really the value in your programming and the way
17 you design your schedule is to appeal to people that
18 reside in the New York area. That's your number one
19 concern?

20 A That is -- our number one concern is to
21 get ratings in the New York designated market area.

22 Q So you're the only ones with really the

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1 New York perspective on the news. And when you say
2 the New York area, you've got the most watched
3 children's shows -- just let me finish.

4 You added at the end that that does make
5 it promotable or valuable outside the New York area?

6 A Yes.

7 Q So you don't program it to be valuable
8 outside the DMA, but it just happens to be?

9 A It happens to be that there are people who
10 are interested in New York. Either they've gone to
11 school there, they're expatriates of New York,
12 whatever. And I know when I lived outside of New
13 York, if I could catch a New York City news, I would
14 tune into it.

15 Q So there is a certain value to reaching an
16 ex-New York, an expatriate that might have moved out
17 of the New York area to watch WPIX?

18 A I think the satellite distributors have
19 exhibited that by carrying us.

20 Q And that's good for you too, isn't it, to
21 reach those New York viewers?

22 A We don't derive any value from that.

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1 Q Do you think it's a one sided equation
2 that's only value for the carriers?

3 A I haven't seen any evidence to convince me
4 otherwise at this point.

5 Q The satellite carriers -- can satellite
6 carriers insert ads from your --

7 A Not that I am aware of.

8 Q Have you ever shared any ad revenues with
9 the satellite carriers?

10 A We do not sell advertising outside of the
11 New York DMA, so there would be no reason to share
12 with them.

13 Q Do you ever carry any of the infomercial
14 type programming?

15 A We traditionally have about an hour and a
16 half or two hours in the wee hours of the weekend of
17 infomercial programming.

18 Q Do you know if ever any of the sales have
19 been made of products on the infomercials that are
20 bought by people outside of the New York DMA?

21 A It's possible. I don't know of it. I'm
22 not aware of what -- our rate structure is different

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1 than any other New York station. You know --

2 Q Well, do you get to share in any revenues
3 from New Yorkers buying products over the
4 infomercials?

5 A My understanding is that our -- and
6 forgive me; this is not my area of expertise, sales.

7 But my understanding is that we sell it on
8 a rate basis, not on a per inquiry basis. So we do
9 not participate to the -- in a profit to the extent
10 that they receive a certain number of inquiries or a
11 certain number of orders for the product that they're
12 selling.

13 They simply pay a flat rate for the half
14 hour, put their show on; and whatever revenue they
15 generate from that, we don't have any participation
16 in.

17 Q So unlike the other programming,
18 infomercial producers pay you for carriage?

19 A That's correct.

20 Q So that they can maximize the number of
21 people that might see their product and buy it?

22 A Uh-huh.

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1 Q In a sense, they're just like an
2 advertiser, except they dominate for a particular
3 period of time. They want to have viewers?

4 A Correct.

5 Q Do they ever pay a rate to you that
6 includes a calculation of viewers that are outside of
7 the DMA?

8 A Not that I'm aware of.

9 MR. SEIVER: That's all I have.

10 CHAIRMAN GRIFFITH: All right, thank you.

11 Any other party to cross examine?

12 Mr. Garrett?

13 CROSS EXAMINATION

14 BY MR. GARRETT:

15 Q Good morning, Mr. Graff.

16 I'm Bob Garrett, and I represent the Joint
17 Sports Claimants in this proceeding.

18 Mr. Graff, WPIX broadcasts programming 24
19 hours a day, correct?

20 A Yes.

21 Q 365 days a year?

22 A That's correct.

1 Q You put out about 8,760 hours of
2 programming in the course of the year?

3 A I'll trust your calculation on that.

4 Q I've used that number before.

5 MR. SEIVER: What did you say, 8,000?

6 MR. GARRETT: 760.

7 Are you checking?

8 MR. SEIVER: I'm going to.

9 MR. GARRETT: Then I'd better move on.

10 (Laughter.)

11 BY MR. GARRETT:

12 Q I take it that WPIX creates some of its
13 own programming like the nightly news, for example?

14 A That's correct.

15 Q And you also go out in the marketplace and
16 you purchase programming from other sources, correct?

17 A Correct.

18 Q And when you purchase that other
19 programming, you pay a license fee, correct?

20 A That is correct.

21 Q And that license fee is determined through
22 marketplace negotiations, correct?

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1 A Yes.

2 Q And I take it from your answers to Mr.
3 Seiver that the amount of those license fees are
4 dependent upon the advertising revenues that you
5 generate from the New York market, is that correct?

6 A Yes.

7 Q Now you're aware, are you not, that the
8 satellite carriers take the programming on WPIX and
9 distribute it around the country?

10 A Yes.

11 MR. SEIVER: I want to object to that
12 characterization, but the witness has already
13 answered, so I'll withdraw it.

14 CHAIRMAN GRIFFITH: All right.

15 MR. GARRETT: Okay. Well, maybe I'll give
16 you another chance, sir.

17 (Laughter.)

18 BY MR. GARRETT:

19 Q You're aware that one of those carriers is
20 EchoStar?

21 A Yes.

22 Q And that's a DBS operation?

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1 A Yes, I'm aware of that. I became aware of
2 that today.

3 Q Okay. And you're also aware that
4 Superstar is one of those carriers?

5 A Yes.

6 Q Okay, and Mr. Seiver introduced you to Mr.
7 Parker from Superstar and all that?

8 A Yes.

9 Q Okay. And Superstar also retransmits the
10 WPIX signal, all of the copyrighted programming on
11 WPIX, to its subscribers around the country, correct?

12 A Yes.

13 Q Now I take it you don't know anything
14 about the revenues that the satellite carriers receive
15 from the distribution of WPIX to its -- offered to
16 their subscribers?

17 A No, I do not.

18 Q Would it be fair to say that the amount of
19 license fees that you pay to program owners is not
20 dependent upon whatever it is that the satellite
21 carriers receive in the way of revenues from the sale
22 of WPIX programming?

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1 A No, there is no relationship between the
2 two.

3 Q All right. And so Superstar and EchoStar,
4 for example, don't pay any compensation to WPIX for
5 distributing WPIX around the country, do they?

6 A No.

7 MR. SEIVER: Again, I'm going to object
8 because I think this is getting into an area where I
9 thought the witness had said he did not have an
10 understanding, and I think there might be a
11 misconception.

12 MR. GARRETT: There was a great deal of
13 discussion this morning about the relationship between
14 WPIX and the satellite carriers, about the revenues
15 that WPIX generates; and I'm simply trying to explore
16 that testimony. And again, if the witness does not
17 know, he can say he doesn't know.

18 MR. SEIVER: I'll withdraw my objection,
19 and I might have to have just one more question on
20 recross.

21 CHAIRMAN GRIFFITH: All right.

22 If you can answer, sir?

1 THE WITNESS: Could you ask the question
2 again, please?

3 BY MR. GARRETT:

4 Q I was afraid you were going to say that.
5 That's why he objected.

6 A That's right.

7 Q Well, let's go back again here.

8 The revenues that you pay to the various
9 program owners are not dependent in any way upon the
10 revenues that the satellite carriers receive from the
11 sale of WPIX programming throughout the country?

12 A That's correct.

13 Q Okay. The revenues that you pay to the
14 program owners are dependent upon the advertising
15 revenues that are generated from the sale of
16 advertising in New York, right?

17 A Yes.

18 Q Okay. And whatever it is that the
19 satellite carriers are receiving from the sale of WPIX
20 programming, that does not factor into your payment of
21 a license fee for -- to the program owners, correct?

22 A No, it does not.

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1 Q Okay. So that I understand here, WPIX
2 pays a license fee to program owners, correct?

3 A Yes.

4 Q And WPIX is then distributed around the
5 country by satellite carriers, correct?

6 A Yes.

7 Q But when the satellite carriers distribute
8 that programming of WPIX around the country, they are
9 not paying any portion of the revenues they receive to
10 WPIX?

11 A I'm not aware of any --

12 MR. SEIVER: That's my objection; and I
13 will clear that up on cross.

14 CHAIRMAN GRIFFITH: All right.

15 BY MR. GARRETT:

16 Q You may continue with your answer.

17 A Yeah, I'm not aware of any fees we receive
18 from satellite carriers.

19 Q Okay. Other than what you might receive
20 through these proceedings here, correct?

21 A Correct.

22 Q Okay.

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1 MR. SEIVER: My objection continues.

2 MR. GARRETT: Is there anything else I can
3 ask for you?

4 (Laughter.)

5 MR. SEIVER: Just clear it with me first,
6 Bob.

7 BY MR. GARRETT:

8 Q And likewise, none of the revenues that
9 the satellite carriers are obtaining from the sale of
10 WPIX programming around this country go directly to
11 copyright owners other than through these Section 119
12 proceedings, correct?

13 A I can't answer that question.

14 Q Okay. Now are you familiar with a
15 gentleman by the name of Preston Padden?

16 A Yes.

17 Q And Preston Padden used to be head of the
18 Independent Television Association, correct?

19 A Yes.

20 Q And the Independent Television Association
21 was the trade association that represented all of the
22 independent television stations throughout this

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1 country?

2 A I believe it's the Association of
3 Independent Television Stations is the name of the
4 organization.

5 Q Okay.

6 A Was the name of the organization.

7 Q And Mr. Padden is now head of -- one of
8 the officers of ASkyB, correct?

9 A That's my understanding.

10 Q All right, and you're not aware of this,
11 I take it, but Mr. Padden is going to be a witness in
12 this proceeding later on.

13 Did you know that?

14 A No, I didn't know that.

15 Q Let me just hand you --

16 MR. GARRETT: May I hover over the
17 witness?

18 CHAIRMAN GRIFFITH: All right.

19 MR. GARRETT: A document that was --

20 MR. SEIVER: Excuse me; I'm going to
21 object.

22 I'm not sure that -- he doesn't know

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1 anything about Mr. Padden being a witness in this
2 proceeding. I'm a little concerned that now we're
3 going to get some testimony about some congressional
4 document that I don't have in front of me and I don't
5 think anybody else has.

6 MR. GARRETT: Well, I'm sorry, but this
7 was the document you introduced yesterday.

8 MR. SEIVER: Well, --

9 MR. GARRETT: SBCA 10-X.

10 MR. SEIVER: If you would have told me
11 that, that would have been a help.

12 MR. GARRETT: Okay.

13 MR. SEIVER: If you can tell me what page
14 you're going to?

15 MR. GARRETT: I will indeed.

16 MR. SEIVER: Before you have him read it?

17 MR. GARRETT: Anything else?

18 MR. SEIVER: I'll let you know in advance.

19 MR. GARRETT: Okay.

20 MS. DONOGHUE: Your Honor, Kristin
21 Donoghue from American Sky Broadcasting.

22 I'd like to support Mr. Seiver's

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1 objection. I think this is going beyond the scope of
2 anything that was in Mr. Graff's direct testimony.

3 MR. GARRETT: I haven't asked my question
4 yet.

5 CHAIRMAN GRIFFITH: Let me hear the
6 question. Let us hear the question first, please.

7 BY MR. GARRETT:

8 Q I want to direct your attention here to
9 what has already been marked as SBCA 10-X; and in
10 particular, to pages 264 of 10-X.

11 Do you have that in front of you, Mr.
12 Graff?

13 A Yes.

14 Q Okay. And page 264 indicates that this
15 was testimony provided by a Preston Padden before the
16 House subcommittee in January of 1988, is that
17 correct?

18 A Yes.

19 Q Okay. Now let me direct your attention to
20 page 266 of the -- of SBCA 10-X.

21 Do you have that before you?

22 A Yes.

1 Q And let me in particular direct your
2 attention to the second paragraph under roman numeral
3 I on page 266.

4 Do you have that before you?

5 A Yes.

6 MR. SEIVER: Yes, and I'm going to object
7 to anything further on this since this was an area
8 that I believe the witness had no expertise in when I
9 was inquiring about the compulsory license and the
10 rates. And that seems to be the topic in this matter.

11 CHAIRMAN GRIFFITH: All right.

12 MR. GARRETT: Well, Your Honor, I don't
13 agree with that characterization of the paragraph.
14 But this particular paragraph here deals -- provides
15 Mr. Padden's testimony concerning the program license
16 fees that independent television stations pay in free
17 marketplace negotiations to obtain the programming
18 that is then redistributed by satellite carriers.

19 And I do think that was an essential focus
20 of the examination that Mr. Seiver did of this witness
21 here. It's a little difficult to argue the relevancy
22 of this here without having the exact passage before

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1 the Panel, and I understand that you don't have a copy
2 of this before you.

3 And I would suggest --

4 MR. SEIVER: If it may please the Court,
5 I'll approach and -- I have one extra copy. It's not
6 marked up.

7 MR. GARRETT: Page 266. And I have marked
8 the --

9 CHAIRMAN GRIFFITH: Paragraph?

10 MR. GARRETT: --- paragraph that I would
11 like to ask him about.

12 MR. SEIVER: If I may be heard, Your
13 Honor?

14 CHAIRMAN GRIFFITH: Yes.

15 MR. SEIVER: I believe the witness
16 disclaimed knowledge of what other broadcasters do for
17 paying for license fees. This is talking about the
18 industry. He knows about WPIX, and he's testified to
19 that. This document is an exhibit and readily
20 available and officially noticed.

21 I don't think we're going to benefit
22 anything from having this witness read particular

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1 paragraphs and be asked to agree or disagree with
2 whatever might be in there.

3 I think this is going beyond the scope of
4 cross and beyond the scope of the witness' knowledge.

5 CHAIRMAN GRIFFITH: All right, Mr.
6 Garrett?

7 MR. GARRETT: Your Honor, I disagree that
8 it's going beyond the scope of the examination that
9 Mr. Seiver has already conducted here. I believe Mr.
10 Seiver has inquired rather extensively into the
11 relationship between WPIX and those with whom WPIX
12 deals, the program owners.

13 He's talked about the nature of the fees
14 that WPIX pays. I think I'm entitled to determine
15 whether or not his experience is consistent with --
16 that is, WPIX's experience, is consistent with the
17 experience that Mr. Padden lays out for the entire
18 industry.

19 And then also -- I'll stop there.

20 MR. SEIVER: And Mr. Padden will be a
21 witness in a few weeks.

22 CHAIRMAN GRIFFITH: I understand.

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1 Does ASkyB have an objection to this as
2 well? Same objection as Mr. Seiver?

3 MS. DONOGHUE: Yeah, I would just support
4 Mr. Seiver's objection.

5 CHAIRMAN GRIFFITH: All right.

6 Has this document been admitted into
7 evidence or not?

8 MR. GARRETT: No, Your Honor.

9 CHAIRMAN GRIFFITH: Okay.

10 MR. GARRETT: I believe it simply was used
11 yesterday for impeachment purposes.

12 CHAIRMAN GRIFFITH: Yes, okay.

13 Mr. Garrett, you're attempting to use this
14 document which doesn't have a sponsoring witness for
15 the purpose of impeachment of this witness?

16 MR. GARRETT: And to explore the areas of
17 testimony that he's already given, Your Honor.

18 I'm not trying to have it admitted into
19 evidence. I'm not trying to use it as substantive
20 evidence here. I'm simply -- want to explore the
21 witness' knowledge on an area that he's already
22 testified on focusing on statements made in this

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1 testimony.

2 CHAIRMAN GRIFFITH: Okay.

3 All right, the objection is overruled.

4 BY MR. GARRETT:

5 Q Mr. Graff, then let me direct your
6 attention here to page 266 of SBCA Exhibit 10-X. And
7 I have marked the second paragraph under roman numeral
8 I. And I ask that you read that into the record, and
9 then I have a question for you concerning it.

10 A "Program license fees set by the forces of
11 the marketplace represent the single largest cost
12 category in the operation of an independent television
13 station. Currently, these fees constitute
14 approximately one-half of the total expense of the
15 average independent station.

16 "In fact, high program costs have been a
17 major contributing factor to the financial
18 difficulties of the 23 independent stations forced
19 into bankruptcy proceedings in the last year."

20 Q Now Mr. Graff, let me just ask you -- now
21 that first sentence that program license fees are set
22 by the forces of the marketplace represent the single

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1 largest cost category in the operation of an
2 independent television station, would that same
3 statement apply to WPIX?

4 A Yes.

5 Q And I take it you don't have knowledge of
6 the program expenses of stations other than WPIX, is
7 that correct?

8 A Only cursory knowledge of stations that
9 I've worked at, and that knowledge grows less accurate
10 as time goes on.

11 Q Okay. There's also a statement here that
12 these fees constitute approximately one-half of the
13 total expenses of the average independent station.

14 Would that statement be approximately
15 correct for WPIX?

16 A That I couldn't answer with any authority.

17 Q Okay. Now I take it you don't know -- you
18 have no personal knowledge of how much either -- how
19 much Superstar receives for the sale of WPIX
20 programming to its paying subscribers, do you?

21 A No, I don't.

22 Q And you have no knowledge of how much

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1 EchoStar receives for the sale of WPIX and other
2 programming to its paying subscribers, do you?

3 A No, I don't.

4 Q You were also asked some questions about
5 the New York Yankees. Do you recall that?

6 A Yes.

7 Q How long has WPIX broadcast the games of
8 the New York Yankees?

9 A Approximately -- nearly 50 years.

10 Q Fifty years.

11 Now going back to --

12 A To --

13 Q -- even before I was alive?

14 (Laughter.)

15 Not by much.

16 MR. SEIVER: There was no television then.

17 (Laughter.)

18 MR. GARRETT: Those youngsters.

19 BY MR. GARRETT:

20 Q Fifty years, you said?

21 A Approximately.

22 Q Okay. Now Mr. Seiver had talked about

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1 this speculation of WPIX no longer broadcasting the
2 New York Yankees; do you recall that?

3 A Yes, I do.

4 Q Now has -- have you ever heard that
5 speculation before?

6 A Yes, I have.

7 Q Did you hear it maybe last year, for
8 example?

9 A Yes, I would say that that speculation
10 began last year or certainly was discussed toward the
11 latter part of last year.

12 Q Okay. And is it not true that there has
13 been speculation about the Yankees going off of WPIX
14 and free TV in New York the last several years?

15 A I'm not completely conversant with the
16 details of that. I understand that at the time when
17 the Yankees' principal owners sold the television
18 rights to Madison Square Garden, which was a multi-
19 year deal, there was concern expressed that there
20 would be no broadcast games -- no games available on
21 broadcast television in the New York market.

22 Subsequently, arrangements were made for

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1 Madison Square Garden to lease time on us to provide
2 50 games per year.

3 Q And that contractual arrangement that you
4 talked about, the sale of Yankees' rights to Madison
5 Square Garden, took place several years ago, did it
6 not?

7 A Yes.

8 Q Okay. In fact, it was, what,
9 approximately -- how many years ago was it?

10 A I wasn't at WPIX at the time. It might
11 have been 1990, around there.

12 Q Okay. And you're aware that virtually
13 every year when this rumor arises about the Yankees
14 going off of WPIX, the Yankees and Major League
15 Baseball get hauled off in front of Congress to say
16 that no, it's not going to happen?

17 MR. SEIVER: Your Honor, I was trying to
18 inquire about this subject and the relationship and
19 the payments, and was met with strenuous objections
20 which were sustained. And now he is turning this
21 witness into a sports expert.

22 If this is allowed, I want to be able to

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1 re-inquire. I have other testimony I want to show him
2 and other articles. I'm going to take another 15
3 minutes with this particular issue if he's allowed to
4 continue.

5 CHAIRMAN GRIFFITH: All right, is there a
6 response, Mr. Garrett?

7 MR. GARRETT: Your Honor, I'll do anything
8 to avoid -- (laughter) -- 15 minutes of his cross
9 examination, so I'll withdraw the question.

10 CHAIRMAN GRIFFITH: It's withdrawn.

11 Thank you.

12 MR. GARRETT: Thank you.

13 CHAIRMAN GRIFFITH: All right, any other
14 cross examination?

15 Did you have any brief recross?

16 MR. SEIVER: Yes, I did.

17 And I understand Your Honor. I will be
18 brief.

19 CHAIRMAN GRIFFITH: All right. And I want
20 to give this back to you, Mr. Seiver.

21 MR. SEIVER: Thank you.

22 RECROSS EXAMINATION

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1 BY MR. SEIVER:

2 Q Mr. Graff, just a couple of questions.

3 I think there might have been a misspoken
4 word when Mr. Garrett was asking you about selling
5 WPIX programming. We had talked about whether you
6 could actually have programming sold or the signal
7 sold.

8 You understand the distinction, as I
9 right?

10 A Yes.

11 Q Superstar doesn't take your programming
12 and sell it?

13 A And sell it elsewhere, correct.

14 Q They pick up your signal pursuant to their
15 license. It's clear all the rights nationally rather
16 than you buying the rights for national and then
17 selling -- okay, Superstar, here's xena, you can sell
18 it.

19 A Yes.

20 Q Am I right about that distinction?

21 A You're correct.

22 Q And then you were talking about Mr. Padden

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1 over our objection about Mr. Padden's testimony, and
2 I believe there were some stations in there that were
3 mentioned that were spending considerable amounts of
4 money and maybe went bankrupt.

5 How is WPIX financially?

6 A My understanding is that WPIX is very
7 sound financially.

8 Q And the Tribune Company as well?

9 A Yes.

10 MR. SEIVER: And that's all I have.

11 CHAIRMAN GRIFFITH: All right.

12 Any redirect?

13 MR. STEWART: Yes, Your Honor.

14 CHAIRMAN GRIFFITH: All right, thank you.

15 REDIRECT EXAMINATION

16 BY MR. STEWART:

17 Q Mr. Graff, first I want to direct your
18 attention to this -- do you call it a comparagraph --

19 A Yes.

20 Q -- that Mr. Seiver had marked for
21 identification as SBCA Exhibit 12-X.

22 A Yes.

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1 Q First of all, if you look at -- on the
2 first page here, over on the left-hand column under
3 WGN at 3:00, there's Beverly Hills 90210.

4 Do you see that?

5 A Correct.

6 Q And over on the right-hand column at 4:00
7 p.m. on WPIX, you see Beverly Hills 90120; do you see
8 that?

9 A Yes.

10 Q Now is that the same episode of Beverly
11 Hills 90210 on the two different stations?

12 A It would be unlikely that it would be the
13 same episode. At this point in Beverly Hills 90210's
14 distribution structure, it is at the station's
15 discretion when they air particular episodes.

16 So it would be a matter of coincidence
17 only if out of the 160-some odd episodes that exist in
18 syndication of this show, same station aired them --
19 same station aired the same show.

20 Q And the choice of which episode to air is
21 part of your program scheduling effort that you talked
22 about before?

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1 A Absolutely.

2 Q And WGN's is done by WGN's program
3 director?

4 A Yes, it is.

5 Q Now could one tell with these three
6 stations available via satellite which one was from
7 Chicago and New York and Los Angeles -- which one was
8 from Chicago, which one was from New York, which one
9 was from Los Angeles?

10 A By watching the stations, I believe it
11 would become very readily evident where the market of
12 origin was simply because the identification will
13 include -- the station's identification will include
14 the city of origin; advertisements, local
15 advertisements that would appear on each station would
16 have the flavor or the accents that are peculiar to
17 the particular region where the station is.

18 Q Would the people in New York talk
19 differently from people elsewhere?

20 A So I understand.

21 Q All right, now I'd like to cover a final
22 area with you that Mr. Seiver discussed with you, and

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1 that has to do with advertising sales.

2 He talked to you first about national
3 advertisers. Do you recall that?

4 A Yes.

5 Q And that's advertisers as distinct from
6 national advertising. I'd like to keep that
7 distinction clear, all right?

8 A Yes.

9 Q And then there are local advertisers, all
10 right?

11 A Yes.

12 Q And both of those kinds of advertisers
13 would buy advertising time on WPIX, is that right?

14 A That is right.

15 Q Okay, now --

16 MR. SEIVER: I know this -- I'm sorry, I
17 need to object.

18 Mr. Stewart is leading the witness as if
19 on cross. I know this is redirect. I want to give
20 him room just to get through it, but I'd like to
21 object to the leading question.

22 CHAIRMAN GRIFFITH: Objection sustained.

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1 MR. STEWART: I'd like to draw a map of
2 the United States. I'm telling you that in advance so
3 you'll recognize it.

4 (Laughter.)

5 CHAIRMAN GRIFFITH: Not bad.

6 MR. STEWART: It's fair enough.

7 BY MR. STEWART:

8 Q And is this about right for New York?

9 A Yes, yes.

10 Q I'm indicating on my map about where New
11 York is.

12 Now do you recall that Mr. Seiver asked
13 you about United Video providing information about
14 where WPIX is carried?

15 A Yes.

16 Q Do you have a general idea of where it is
17 carried by satellite?

18 A By satellite? My understanding is it's
19 more prevalent on the eastern part of the country than
20 the western part of the country, but that's about the
21 extent of my knowledge of that.

22 Q Do you have an understanding of where it's

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1 carried generally on cable systems?

2 A A little bit more specifically. It's more
3 concentrated in the northeastern part of the country
4 and begins to peter out once you get into the mid
5 Atlantic and the lower mid Atlantic states.

6 Q Okay. How many television households are
7 there in the New York market?

8 A Approximately 6,800,000.

9 Q 6.8 million? And do you recall in your
10 discussion with Mr. Seiver how many cable households
11 outside the New York market according to him receive
12 the WPIX --

13 A Another three million or so. I believe
14 the total figure was ten million.

15 MR. SEIVER: I believe it was four
16 million.

17 MR. STEWART: Four million outside? Four
18 million outside.

19 THE WITNESS: Okay, sure.

20 BY MR. STEWART:

21 Q Is the WPIX signal available to viewers
22 throughout the country?

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1 A Only through -- if they are in a franchise
2 -- in a cable franchise that carries us or if they
3 have a satellite service available that carries us.
4 Not over the air though.

5 Q Is WPIX available to a non-subscriber --

6 A No.

7 Q -- outside the New York market?

8 A No.

9 Q I want to draw a number of C's to indicate
10 cable carriers, and I'm going to put them mostly in
11 the eastern seaboard region of the United States.

12 All right?

13 A Yes.

14 Q Now could you tell us if a national
15 advertiser wanted to buy time on WPIX, what would the
16 national advertiser -- who would the national
17 advertiser be trying to reach?

18 MR. SEIVER: Objection.

19 I did a lot of examination of advertising
20 and was met with answers that he's not involved in
21 selling the advertising, knows of it generally; and I
22 think this is beyond his competence and clearly beyond

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1 the scope of cross and his direct.

2 CHAIRMAN GRIFFITH: Do you want to
3 respond?

4 MR. STEWART: Your Honor, he has testified
5 that he is aware generally of how advertising works.
6 He was asked a number of questions by Mr. Seiver. I
7 never objected to Mr. Seiver's substantial expansion
8 of his direct, but this goes directly to an issue that
9 was raised during this cross.

10 CHAIRMAN GRIFFITH: The objection's
11 overruled.

12 BY MR. STEWART:

13 Q What is a national advertiser buying when
14 he buys time with WPIX?

15 A He's buying the New York designated market
16 area.

17 Q Did you testify in response to questions
18 from Mr. Seiver that WPIX doesn't get any additional
19 advertising revenue for carriage outside the New York
20 market?

21 A For -- I did testify to that, yes.

22 Q Well, why would that be? Why is that?

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1 A Because that viewership is not
2 traditionally measurable on a -- in a form that
3 advertisers can utilize.

4 Advertisers either want to advertise in
5 local markets and know that they're reaching X number
6 of a particular type of viewer in those local markets,
7 or they'll have national advertising which would be
8 placed on a network or on a broadcast network or a
9 cable network which is trying to reach as much of the
10 country as possible.

11 And the scattered communities which carry
12 us on cable are not quantifiable to the satisfaction
13 of an advertiser to where they can be marketed to an
14 advertisement because it is -- it's not national, it's
15 not local; it's just kind of all over, you know,
16 certain parts of the country.

17 Q So how does a national advertiser cover
18 the nation?

19 A Either buying cable networks and broadcast
20 networks, or buying in local stations in local markets
21 that cover the whole country.

22 So if, let's say, the advertiser really

1 only wants to reach the top 60 or 70% of the country
2 population-wise, that advertiser can make purchases in
3 those individual markets to meet their target.

4 Q All right, now -- and what about local
5 advertisers? Do local advertisers pay WPIX additional
6 revenues because of their carriage outside the --

7 A No, they do not.

8 Q Now Mr. Seiver talked to you about a
9 meeting you had or a meeting you attended with
10 representatives of United Video; do you recall that?

11 A Yes.

12 Q About information that you provided to
13 United Video, is that right?

14 A It was an exchange of information. They
15 also provided a little bit of information to us.

16 Q I'm sorry, that's right; it was -- it did
17 have to do with this carriage information that they
18 provided to you. Did you also provide information to
19 them?

20 A Just general information about our
21 programming. That was really it.

22 Q Was that information requested by them?

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1 A I think it was just a topic of
2 conversation.

3 Q All right, now if at that meeting -- first
4 of all, you're aware that WPIX is carried by United
5 Video pursuant to the compulsory license, is that
6 right?

7 A Yes.

8 Q So there was no negotiation at that
9 meeting, was there, about --

10 A None whatsoever.

11 Q -- your licensing United Video to carry
12 it, is that right?

13 A No, there was no negotiation.

14 Q If there had been -- if there were no
15 compulsory license and United Video came to WPIX and
16 said we'd like to carry you, would WPIX be interested
17 in negotiating a fee for this carriage?

18 A I would think we'd want to explore any --
19 I think we'd want to explore that source of revenue.

20 Q And is there any offsetting advertising
21 revenue that you would receive from carriage of the
22 station outside of the market?

1 A No, there isn't.

2 MR. STEWART: Thank you. That's all I
3 have.

4 CHAIRMAN GRIFFITH: All right.

5 Anything further?

6 MR. SEIVER: Can I just have just two
7 quick ones, Your Honor? I would appreciate it.

8 Thank you.

9 RECROSS EXAMINATION

10 BY MR. SEIVER:

11 Q Just in response to Mr. Stewart's last
12 question, if you did make an agreement and you could
13 clear the rights on the programming itself -- yourself
14 directly make a deal with United Video or Superstar,
15 there is advertising revenue that you could get based
16 on carriage, isn't there?

17 A I don't know how it would be measured or
18 quantified.

19 Q But is it your testimony that the viewers
20 that might be in these outlying areas are no value at
21 all to advertisers?

22 A Those viewers do have value to

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1 advertisers. However, there's no way to quantify them
2 in a way that they can be marketed to advertisers that
3 I'm aware of.

4 Q That you're aware of; and you're not an
5 advertising specialist?

6 A No.

7 MR. SEIVER: That's all I have. Thank
8 you.

9 CHAIRMAN GRIFFITH: All right.

10 Thank you very much, sir. You may step
11 down. You're free to go.

12 THE WITNESS: Thank you.

13 CHAIRMAN GRIFFITH: Appreciate it.

14 (The witness was excused.)

15 CHAIRMAN GRIFFITH: Who was next?

16 MR. GOTTFRIED: I'd like to suggest we
17 stop for lunch if that's all right.

18 CHAIRMAN GRIFFITH: All right.

19 MR. GOTTFRIED: It might be a good time to
20 take up the schedule.

21 CHAIRMAN GRIFFITH: Well, that's what
22 we're going to do right now then in view of that.

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1 Ms. Woods, you were tardy this morning --
2 (Laughter.)

3 MS. WOODS: I apologize, Your Honor.

4 CHAIRMAN GRIFFITH: -- when we were going
5 to discuss scheduling, and Judge Cooley is prepared to
6 discuss scheduling at this point.

7 Are you available to do that now?

8 MS. WOODS: Certainly.

9 CHAIRMAN GRIFFITH: All right.

10 JUDGE COOLEY: Okay, if there aren't any
11 strong objections to this schedule, this is probably
12 the one we're going to follow. But we'll hear some
13 objections if there any.

14 We have kind of settled on Copyright Owner
15 proposal number two with some changes, all right?
16 We'll keep it the same down through May 12th. That's
17 our first proposal. Keep it identical. And then the
18 testimony begin -- that is the start of the rebuttal
19 case on May 16th, which is unfortunately a Friday.

20 We are suggesting going that Saturday and
21 then the first three days of the following week, 19th,
22 20th, and 21st, if those days are needed; and I

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1 suppose continuing on if an additional day is needed.

2 And then there will be changes then on the
3 filing deadlines, but not much actually. June 19th
4 for the filing of findings of fact and conclusions of
5 law, and then July 8 for the deadline for filing reply
6 findings of fact and conclusions of law.

7 Any problems with that schedule?

8 Yes?

9 MR. GARRETT: Your Honor, that Saturday,
10 that is the weekend my daughter graduates from
11 college. I'm prepared to work around that; but if my
12 absence here would deeply disturb anyone, I just want
13 you to know it wasn't because I didn't want to be
14 here.

15 CHAIRMAN GRIFFITH: The only comment I --
16 well, I have several comments, Mr. Garrett. But the
17 only one I'm going to make is, do we really need that
18 Saturday, do you think; or could we -- well, I think
19 the reason we scheduled it is because Judge Cooley
20 comes in from Chicago for Friday only the way we have
21 it set up.

22 Is it --

1 MR. GARRETT: My suggestion would be to
2 leave it as Judge Cooley has proposed here. We'll see
3 what happens when we all file on rebuttal cases. And
4 if we need that day, we could do it that way.

5 CHAIRMAN GRIFFITH: We'd have it.

6 MR. GARRETT: And if not, we can work
7 around it. But I would simply say go ahead and I
8 won't ask --

9 CHAIRMAN GRIFFITH: I understand.

10 JUDGE COOLEY: There would be an option of
11 just doing that Friday, taking the weekend off, I
12 guess, and coming back on the 19th and going into the
13 next week if you'd want to do it that way. That would
14 be another option.

15 MR. GARRETT: The other option which may
16 be a very realistic one, Your Honor, is that my
17 daughter may fail one of her classes --

18 (Laughter.)

19 JUDGE COOLEY: Keep us posted on that.

20 MR. GARRETT: I've asked her to do that.

21 JUDGE COOLEY: So just so I understand, we
22 are going to go with this schedule, maybe doing

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1 Saturday, maybe not; is that what we've agreed to?

2 MS. WOODS: Your Honor, that's certainly
3 fine for -- Michelle Woods.

4 That's certainly fine for the Copyright
5 Owners.

6 CHAIRMAN GRIFFITH: All right.

7 How about the carriers?

8 MR. SEIVER: That's fine.

9 CHAIRMAN GRIFFITH: All right, thank you.
10 We'll have this --

11 MS. WOODS: Can I ask -- I just have one
12 question about it. There was some discussion
13 yesterday of getting rid of the May 6th and 7th days
14 for follow up discovery requests. Does this schedule
15 include that right now?

16 CHAIRMAN GRIFFITH: Right now it does.

17 MS. WOODS: Okay.

18 JUDGE GULIN: We'll defer to you. Was
19 there agreement? I didn't quite remember whether
20 there's an agreement between both sides to delete that
21 or not.

22 MS. WOODS: Your Honor, Michelle Woods.

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1 We would prefer to have those dates in
2 there, but -- because we've found from experience that
3 there sometimes is follow up. But should we find that
4 they're not necessary, we certainly would be willing
5 to agree at a later date to remove them.

6 CHAIRMAN GRIFFITH: All right, fine.

7 Then we will have this prepared and it
8 will be published by the Copyright Office as the
9 schedule for the remainder of these hearings.

10 All right, we'll take our recess -- let me
11 just ask about the witnesses for this afternoon now.
12 Are we going to have the full afternoon for the
13 witnesses?

14 MR. GOTTFRIED: I have Mr. Hummel, Your
15 Honor. This is Barry Gottfried for the Devotional
16 Claimants.

17 I don't know how much cross -- that won't
18 take the whole afternoon, will it?

19 MR. SEIVER: No, it will not. And I asked
20 Mr. Lane on behalf of the Program Suppliers to bring
21 in Marsha Kessler who's one of his witnesses and
22 she'll be available after 3:00.

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1 MR. LANE: Right.

2 MR. SEIVER: So I think the timing will
3 work out just fine to keep a full day and get two
4 witnesses done.

5 CHAIRMAN GRIFFITH: We'll come back at
6 about 1:45 then.

7 All right, thank you.

8 (Whereupon, the proceedings recessed for
9 lunch at 12:45 p.m.)
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A-F-T-E-R-N-O-O-N P-R-O-C-E-E-D-I-N-G-S

(1:46 p.m.)

CHAIRMAN GRIFFITH: Okay. All right.

MR. GOTTFRIED: Good afternoon. My name is Barry Gottfried and I'm here representing the group of producers of syndicated religious programs with religious themes that have been known as the Devotional Claimants since the days of the old Copyright Royalty Tribunal.

I just want to say in reference, the only think that perked my attention this morning was the comment that New Yorkers sound different than everyone else. I've been denying that for the last 25 years in Washington. You'll have to draw your own conclusions.

The Devotional Claimants support the position of the Joint Sports Claimants, that the royalty rates for a broadcast statio should be adjusted to \$.35 for 1997; \$.36 for 1998 and \$.38 for 1999.

The witness we're presenting to you today and the only witness we're presenting, Mr. David Hummel, is not here to urge you to adopt these rates

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1 or any particular rates. Rather, Mr. Hummel is here
2 to describe the nature and appeal of one type of
3 programming that appears on the television broadcast
4 stations that the satellite carriers sell to their
5 subscribers and that is syndicated religious
6 programming.

7 As the Panel is aware, and it's been
8 brought to your attention in charts, this kind of
9 programming information is one kind of evidence that
10 the Panel is to consider in deciding what the fair
11 rate is for satellite carriers to pay for this
12 carrier.

13 With that, I'd like to call Mr. Hummel to
14 the witness stand.

15 CHAIRMAN GRIFFITH: All right.

16 WHEREUPON,

17 DAVID M. HUMMEL

18 was called as a witness for the Devotional Claimants,
19 having first been duly sworn, assumed the witness
20 stand, was examined and testified as follows:

21 DIRECT EXAMINATION

22 BY MR. GOTTFRIED:

1 Q Good afternoon, can you state your name
2 for the record, sir?

3 A My name is David Hummel, H-U-M-M-E-L.

4 Q And what is your current position, Mr.
5 Hummel?

6 A I'm an independent consultant, marketing
7 consultant serving broadcasters, syndicators and
8 program producers.

9 Q And how long have you held that position?

10 A Approximately four years.

11 Q Mr. Hummel, you have before you a five
12 page exhibit entitled "Testimony of David M. Hummel"?

13 A I do.

14 Q And is that -- and a resume is attached to
15 that?

16 A The resume is not attached.

17 Q Is this your testimony to the tribunal, to
18 the Panel?

19 A Yes, it is.

20 Q Turning -- do you have any changes or
21 corrections to make to that testimony?

22 A No sir.

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1 Q Turning your attention to page 1, line 21,
2 you're one of the people who have line numbers --

3 A I appreciate that.

4 Q Could you briefly describe your background
5 for the benefit of the panel?

6 A I started out in television in Phoenix,
7 Arizona when I was going to college at Arizona State
8 University. My first job was newsreel cameraman for
9 the ABC affiliate in that market.

10 I went on to the local independent
11 station, KPHO TV and worked the rest of the time while
12 I was getting my degree at KPHO. I was at KPHO about
13 eight years. I left KPHO television which was an
14 independent station to go to work with the Proctor &
15 Gamble Company in Cincinnati, Ohio where I worked in
16 their general advertising department and was
17 responsible for working with their advertising
18 agencies in developing advertising for about 21 of
19 their brands over a period of time, usually 6 to 10
20 brands at a time.

21 After 15 years with the Proctor & Gamble
22 Company, I went to work with the Christian

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1 Broadcasting Network where I was responsible for
2 producing programming for that organization, most
3 notable among them was a daytime drama called "Another
4 Life" which was a cable soap. We produced 875
5 episodes of that and then I went on to produce prime
6 time specials and other programming for CBN.

7 Subsequent to that, I ran a broadcast
8 operation for CBN in Lebanon, which fed programming to
9 Israel, Syria, Jordan, Egypt and Cyprus. After doing
10 that for about four years, I returned to CBN, was
11 made Vice President of Marketing. I served in that
12 capacity for about four years and then left their
13 employ about four years ago.

14 Q Since then you've been an independent?

15 A That's correct.

16 Q And what have you been doing in that
17 capacity?

18 A I do everything from advising ad hoc
19 network operators on how to program their networks,
20 how to market their programming, to advising
21 independent stations on how to program themselves and
22 how to promote themselves.

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1 I purchase air time for ministries, for
2 political organizations and for for-profit operations
3 selling retail and direct marketing products.

4 Q When you say "purchase air time" is that
5 on broadcast stations?

6 A That's correct.

7 Q I would make Mr. Hummel available for voir
8 dire.

9 MR. SEIVER: I have no voir dire.

10 CHAIRMAN GRIFFITH: All right, thank you.

11 BY MR. GOTTFRIED:

12 Q Turning to the bottom of page 2, around
13 line 44, Mr. Hummel, could you tell the panel what the
14 purpose of your testimony here is today?

15 A The purpose of my testimony is to
16 establish the value of religious or devotional
17 programming to the direct broadcast industry,
18 establishing that there is a market out there that has
19 a desire for it and seeks it out, that this market is
20 diverse and that the various kinds of devotional
21 programs each have their own following and while some
22 attract more than one segment of that overall market,

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1 some are very specialized and have their own very
2 faithful following that follow those programs and seek
3 them out and seek them as part of the overall package
4 of programming that they would make sure, want to make
5 sure was included in their programming before they
6 paid any premium for any kind of programming service.

7 Q When you say devotional programming, is
8 there just one kind of devotional programming?

9 A There are several kinds.

10 Q And I think beginning at line 55 you
11 describe three kinds of programming?

12 A Yes.

13 Q Would you briefly describe the three kinds
14 of programming for the panel?

15 A In order that's in my testimony, the first
16 is the 700 Club which is a daily magazine news
17 ministry type format show and this runs 5 days a week.
18 It primarily is designed to inform our religious
19 viewers on current events that are important to them,
20 to provide counsel and perspective on those issues, to
21 provide ministry and to in some ways bring them
22 entertainment that is of a Christian value.

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1 The second kind of programming is those
2 which would be best demonstrated by Dr. Stanley or D.
3 James Kennedy where there is a church service that is
4 recorded as a formal church presentation that is
5 primarily -- features some hymns, some singing, some
6 edification and then straight preaching or a message
7 and then there are others that are produced as special
8 events, for example, Kenneth Copeland may have a
9 special presentation in a tent or in an amphitheater
10 and those are primarily exhortation and preaching
11 programs. Each has its own topic and its own focus
12 and its own flow and his own individual appeal to the
13 various viewers that follow them.

14 Q So the audience for these programs are not
15 identical for each of the programs?

16 A Absolutely, they're totally varied. There
17 are people who would watch one but wouldn't watch
18 another, so --

19 Q And on lines 55 and 66 and 75, 77 you've
20 listed stations that those programs are carried on?

21 A Yes.

22 Q And those are stations carried on

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1 satellite?

2 A Yes they are.

3 Q Who verified that?

4 A I verified that based on the ads that
5 appeared in Orbit magazine, the Orbit schedule which
6 lists these programs, schedules for the various
7 superstations and cable systems and direct broadcasts
8 and also from the stations program schedules
9 themselves.

10 Q Could you explain to the panel why this
11 program has value to satellite carriers?

12 A It has been demonstrated over many years
13 now that there is a segment of the audience that finds
14 religious or devotional programming very important to
15 them. In fact, in the early days of cable there were
16 some customers who took cable primarily to get
17 religious programming because it wasn't available to
18 them in any other form.

19 These people, while religious programming
20 isn't the only program they watch or the thing they
21 watch the most, it is important enough to them that
22 they want to make sure it's in their program mix.

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1 They demonstrate that supporting the ministries on
2 occasion and by letters to the various ministries
3 saying why can't I get you on, so there's clearly a
4 demand for that kind of programming.

5 Many carriers of broadcast signals
6 recognize that to make themselves more attractive to
7 the marketplace as a whole that it is important that
8 they have a mix or at least some of this programming
9 available in their program mix so that they can
10 attract that audience, that religious sort of
11 devotional programming that it is important to.

12 Q One program, I think you covered this, but
13 can one program attract that audience, can one single
14 program attract --

15 A No, they're too diversified. I think, for
16 example, Jimmy Swaggart audience may not be as
17 attracted to a Schuler audience or to a D. James
18 Kennedy audience. There are different needs and
19 different wants.

20 Q The Reverend Schuler has a different
21 audience than --

22 A Yes.

1 Q Now on page 4 of your testimony, on line
2 88, you describe an Orbit Magazine study?

3 A Yes.

4 Q Can you describe the result of that study
5 to the panel?

6 A Orbit did a survey of all of its viewers
7 and they mailed out several hundred of these
8 questionnaires and it asked them to rate various kinds
9 of programming which was most very important, sub-
10 important, not important to them. So the results of
11 the survey would obviously add up to more than 100
12 percent because some people would list three or four
13 different programs as being very important to them.
14 In that study, 13.9 percent of respondents indicated
15 that religious programming or devotional programming
16 was very important to them in their viewing day.

17 Q In your experience are the packages of
18 satellite programming aware of the interest in
19 devotional programs?

20 A Yes, they are.

21 Q And to subscribers? And what do you base
22 that?

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1 A I base that on the advertising that they
2 put out themselves on listing the programs, the
3 stations they carry in their package and also the
4 programming of those stations which clearly features
5 that kind of programming.

6 Q Have you spoken to people in the industry
7 about this?

8 A Ys, I have. It is clear that these are
9 programs that -- the people in the industry that I'm
10 referring to are people who are packages of programs
11 and they clearly recognize that value.

12 Q I have nothing further.

13 CHAIRMAN GRIFFITH: All right, cross
14 examine.

15 CROSS EXAMINATION

16 BY MR. SEIVER:

17 Q Good afternoon, Mr. Hummel. We met
18 earlier but for the record my name is John Seiver and
19 I'm co-counsel for the Satellite Carriers.

20 Have you testified in these types of
21 proceedings before?

22 A I've never testified before.

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1 Q Your first time We have two first timers
2 today.

3 I want to ask you some questions about
4 your testimony. If you don't understand me, you can
5 always ask me to repeat the question. Of course, if
6 there's an objection, wait until there's a ruling
7 before you blurt out an answer.

8 I want to understand a little bit about
9 your background. You had said that you had experience
10 working both for religious programmers and also I
11 believe as an agent. Am I correct that you said you
12 currently placed broadcast air time for religious
13 programmers?

14 A Uh-huh.

15 Q For the record I would just ask you to say
16 yes or no. It's easier for the --

17 A Yes, I do.

18 Q So it's clear. What does it mean that you
19 place broadcast air time for religious programmers?

20 A I purchase air time on broadcast stations.

21 Q In other words you pay the broadcasters to
22 carry the religious programming?

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1 A That's correct.

2 Q Is that the way most broadcasters get
3 programming?

4 A It depends on the nature of the program.
5 I'm not being vague, but certainly religious
6 programmers, devotional programmers usually buy the
7 time that runs their program, yes.

8 Q As opposed to syndicators of popular
9 series that would place programming. Are they usually
10 the ones that are being paid by the broadcasters or do
11 they pay broadcasters?

12 A The broadcaster inevitably will get time
13 for his air time. He either gets it by selling it to
14 a direct broadcast -- to a religious programmer, to a
15 direct marketer such as infomercials or by making his
16 time available to national advertisers through
17 indicated programming that come to them on a barter
18 basis.

19 But the broadcaster's business is selling
20 time. Nobody gets on unless the broadcaster gets
21 money for it.

22 Q So when the broadcaster is paying

1 whatever, tens of millions or hundreds of millions for
2 let's say to Major League Baseball for the rights to
3 carry games, that's not an isolated transaction. You
4 have to look at it in the context of --

5 A I'm not an expert on sports programmings.

6 Q So as I see it then, your representation
7 of the religious programmers, you will go to the
8 various broadcasters, I presume some of the ones that
9 were listed, WGN, maybe and WWOR to arrange for your
10 clients' religious programming to be carried?

11 A That's correct.

12 Q And when you make those arrangements, is
13 there any other revenue sharing that you engage in
14 with the broadcaster based on any money that might be
15 raised by you during the course of your program?

16 A None.

17 Q Do the religious programmers whose
18 programs you place ever have appeals to the audience
19 to send money?

20 A Yes.

21 Q And is that one of the ways that the
22 religious programmers get compensated?

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1 A That's one of the ways, yes.

2 Q Is there another way?

3 A Yes, they use direct mail and
4 telemarketing as well.

5 Q So it's valuable to the religious
6 broadcaster to have as many people seeing the
7 programming as possible?

8 A That is a value to the programmer, yes.

9 Q And when you contract with a broadcast
10 station to place your religious programming on that
11 station, does the rate vary with the size of the
12 market in which that broadcaster operates?

13 A Only in terms of the size of the local
14 DMA. Religious broadcasters value markets the same
15 way commercial advertisers do and they measure by DMA,
16 the Nielsen designated marketing area and they try to
17 evaluate the value of that station's air time based on
18 the lead in program, if you will.

19 Q Well, are you the person that would sell
20 the 700 Club to KWGN and WWOR?

21 A I would buy the time for it.

22 Q You would buy the time for the 700 Club?

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1 A Yes.

2 Q And when you sit down to negotiate with
3 KWGN or WWOR is your payment based on the size of
4 Denver DMA or the New York DMA?

5 A Yes, to the local DMA.

6 Q Just to the local. do you have to pay
7 anything additional to KWGN or WWOR to account for any
8 cable or satellite carriers for those particular
9 stations?

10 A No, I do not.

11 Q Are you aware of the extent of the
12 satellite carriers to those two stations?

13 A Not in any real detail. We primarily try
14 to buy specific markets.

15 Q It is not of interest to you that there
16 may be an additional 5 million or 10 million
17 subscribers to a particular super station for whom you
18 are -- on whom you are placing your religious
19 programming?

20 A I'm sure it has some value, but it can't
21 -- there's no way to really measure it because the
22 fact that there's a universe out that can see the

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1 program, does not necessarily convert that universe
2 into viewers and there's no way to measure that
3 universe in terms of viewers. So the purchases made
4 and value primarily on the size of the local DMA.

5 Q You have no way of determining when people
6 all in to either order products or contribute money
7 where they're calling from or sending their money
8 from?

9 A Oh yes, we can determine where they're
10 coming from, but we are also in broadcast in so many
11 markets it's difficult to tell whether or not that
12 person saw us on the local broadcast station or on a
13 superstation or how they saw the program.

14 Q Wouldn't that be some information that
15 would be valuable to you?

16 A It is and we've tried to gather it, but
17 it's difficult because the viewers don't know where
18 they're getting it. Most people when they call in to
19 make a donation, they're not really prepared to answer
20 a telemarketer's query on their viewing habits and
21 sometimes that turns off the donor and since the
22 purpose of the call is to receive the donation,

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1 they're reluctant to turn it into some sort of
2 interview.

3 But even on the rare occasion when the
4 question has been asked, it has been my experience
5 that the viewer who has cable attributes everything to
6 cable, even though they're watching the local station
7 on the cable system.

8 Q Well, the 700 Club runs on other stations
9 besides KWGN and WWOR?

10 A Yes.

11 Q How many other stations?

12 A Approximately 90 other stations.

13 Q 90 stations and let's take a market, for
14 example, just for lack of a better term, Broken
15 Arrow, Oklahoma, you don't have the broadcaster in
16 Broken Arrow, Oklahoma, I presume, carrying the 700
17 Club?

18 A I'm not aware that there is a broadcaster
19 in Broken Arrow.

20 Q If you got a call from a viewer that
21 wanted to make a contribution, could you not then
22 assume that they're on cable or satellite if they're

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1 not within one of the 90 markets?

2 A They could be getting it from that source.
3 However, they could also be getting it because they
4 were in another community where they were on our
5 mailing list and we simply followed them to that
6 community, direct mail is a very large portion of fund
7 gathering and in most ministries and especially in the
8 700 Club.

9 Q So you have no way of distinguishing
10 between people that mail in their checks or direct
11 mail response or call in in response to watching the
12 show?

13 A Unless they voluntarily put forth that
14 information, there's no hard effort. It hasn't been
15 fruitful. They haven't been able to determine it.

16 Q So I'm not sure then how you can determine
17 what to pay a broadcaster in a particular area for
18 carrying broadcast time if you have no way of tracking
19 where the contributions --

20 A Generally, the broadcasters themselves
21 have very strong suggestion of what we should pay.

22 (Laughter.)

1 And that's where the negotiation begins.
2 And we simply put a value on the air time and then our
3 guess is whether or not donations from that market
4 will pay to keep the program on the air.

5 Q How do you determine what the extent are
6 to the donations from that market?

7 A By the donations that come in from
8 addresses within that DMA.

9 Q And if they come from outside the DMA, how
10 do you count those?

11 A Somewhere else. I'm not being flip, but
12 that's basically the extent of the sophistication.

13 Q I'll be more direct. Don't you think it
14 would be an enhancement for your clients if in fact
15 you were placing ads for them based on the number of
16 satellite subscribers that you knew were able to
17 receive particular programming?

18 A Ask me that again, I'm sorry, I got lost.
19 It was a long question

20 Q Wouldn't it be an advantage to your
21 clients who are interested in expanding the reach of
22 their programming to know that they're going to be

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1 received by satellite subscribers in order to --

2 A I would think that that would be of value.
3 My answer is probably to some degree, but it's hard to
4 measure it. You've got to remember that the purpose
5 of the program is not to make money. It is to
6 minister. It's a different point.

7 Q But the making the money, at least,
8 underwrites the cost of ministering?

9 A It helps to, yes.

10 Q It's helps to underwrite that. Now your
11 testimony here, I think, Mr. Gottfried made a point of
12 saying that you're not testifying as to what rates
13 should be for superstations or network stations?

14 A That's correct.

15 Q But you do understand that that's what
16 this panel is supposed to do?

17 A Yes.

18 Q And do you specifically what this panel is
19 supposed to value in making a conclusion as to what
20 the superstation rates are supposed to be?

21 If you don't know, that's fine.

22 A I don't know the answer to that.

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1 Q You haven't herd the term secondary
2 transmission?

3 A Only this morning and when --

4 Q When I asked another witness about it?

5 A Yes.

6 Q In your line of work, you have said here
7 that -- or it was either you or Mr. Gottfried that you
8 could testify as to the nature and appeal as well as
9 the value of the religious programming, is that right?

10 A Uh-huh.

11 Q And I think I wrote down that you would
12 establish, you helped established the value of
13 religious programming to the DBS industry, do you
14 remember that?

15 A That I helped to establish?

16 Q That you could give testimony to help
17 establish the value of religious programming for the
18 DBS industry?

19 A Uh-huh.

20 Q Now did you also mean -- just so we're
21 clear, we have had a distinction between DBS and C-
22 band. Do you understand that distinction?

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1 A Yes, I do.

2 Q C-band is the larger dish, lower powered.

3 A I own one, yes.

4 Q You have one. Do you also have a high
5 powered DBS dish?

6 A No, because I can't see their satellite
7 from my yard. I wish I could.

8 Q And on the C-band satellite, when you say
9 the value of the religious programming to the
10 industry, do you mean to viewers, to satellite
11 carriers, to program packagers? Who are you referring
12 to?

13 A The value of the programming is to the
14 viewer themselves and then the viewer then has value
15 to the DBS operator. If -- when a direct broadcast
16 organization is out seeking subscribers, part of the
17 benefit of purchasing their service versus another is
18 what programming is unique to them that they feel is
19 important in a marketplace and those who carry
20 religious programming by virtue of carrying the
21 programming clearly indicate that there is some value
22 to this and there was an article in I think last

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1 September, October's Broadcasting and Cable that
2 indicated that the two primary carriers at the time,
3 Direct TV and Echo Star, one of them had indicated
4 that they needed to add some of that programming. I'd
5 have to go get the article for you in order to be more
6 competitive with the other.

7 As a matter of fact, I believe TBS is
8 carried on both systems.

9 Q I'm sorry?

10 A Trinity Broadcasting is carried on both
11 systems.

12 Q Trinity Broadcasting. We use TBS
13 sometimes as a shorthand for WTBS.

14 A I understand.

15 Q And does WTBS have any religious
16 programming?

17 A I haven't followed their program schedule.

18 Q You don't sell them --

19 A No, I don't purchase time on WTBS.

20 Q I'm sorry. I want to keep the terms
21 correct. You do not purchase time from WTBS.

22 You mentioned KWGN and WWOR, WGN -- we've

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1 established that you haven't bought time on WTBS.

2 Have you bought any time on WSBK?

3 A I have not directly no.

4 Q And have you bought any time on KTLA?

5 A I bought time on KTLA several years ago,
6 but the program is no longer on KTLA. It's on KCOP.

7 Q Is your testimony today essentially that
8 those superstations that carry religious programming
9 are more valuable than stations that do not carry
10 religious programming?

11 A No. More valuable to whom?

12 Q More valuable to the DBS industry?

13 A I would think so, yes. Simply because
14 they provide again a variety of programming that may
15 not be available to that viewer in that specific
16 locale.

17 Q Now you had mentioned that cable
18 subscribers also have access to this program, am I
19 right? You said that some people when they call in
20 they say I'm watching it on cable, whether it's over
21 the air --

22 A That's correct.

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1 Q And is that because not only you sell this
2 program, you purchase time not only on the broadcast
3 stations but you purchase time on cable networks, am
4 I right?

5 A The Family Channel carries the 700 Club by
6 virtue of a contract that was created several years
7 ago, but to my knowledge that's the only cable network
8 that carries the 700 Club.

9 Q So we're clear, Christian Broadcasting
10 Network changed its name and became the Family
11 Channel, is that right?

12 A No. The Christian Broadcasting Network is
13 still the Christian Broadcasting Network. They had a
14 subsidiary called CBN Cable Network. CBN Cable
15 Network was sold in part to TCI and others and I'm not
16 privy to the deal, but Christian Broadcasting Network
17 still exists as the entity that produces the 700 Club.

18 Q For over the air?

19 A Over the air and also on the Family
20 Channel.

21 Q And on the Family Channel. So religious
22 programming is available on these superstations as

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1 well as on the Family Channel.

2 Are there any other programmers on the
3 satellite or available to backyard dish owners that
4 carry religious programming?

5 A If you scan across the dial on a C-band
6 dish you'll see associated or you'll see occasional
7 ministry programs, none of which re nationally -- very
8 few of which are nationally known. They're primarily
9 small operations from local churches or local towns.

10 Q You don't sell any programming to them?

11 A I don't buy any programs.

12 Q I'm sorry. You don't purchase time from
13 them?

14 A I do purchase time on WHAT which is used
15 to distribute the 700 Club to broadcast stations as a
16 means of delivering the program to broadcast stations
17 across the country. Primarily Christian stations and
18 low power stations.

19 Q Primarily, I'm sorry?

20 A Christian stations and low power stations.

21 Q I want to ask you what's been marked as an
22 exhibit of which I'm going to mark as Exhibit 12X, 13,

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1 I'm sorry. It's a two-sided document.

2 (The document referred to was
3 marked for identification as
4 Exhibit SBCA 13-X.)

5 I have the original here. I'm sorry, am
6 I one short? It's just one page. I have the original
7 here if you'd like to see it, Mr. Hummel.

8 Do you recognize this?

9 A Yes, this is from Orbit Magazine.

10 Q This shows the satellite TV C-band
11 channels, am I right?

12 A That's correct.

13 Q And it's color coded. It's difficult on
14 the copy, but that's the best I could do without a
15 color copier.

16 If I could approach the witness and show
17 him. They color coded, did they not, Mr. Hummel, to
18 show what is free and what is subscription? Is that
19 correct?

20 A That's correct.

21 Q And also what's not available in the U.S.

22 A Uh-huh.

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1 Q And if you would turn it over you see they
2 also list the C-band channels by interest?

3 A Uh-huh.

4 Q And there's a category that does say
5 religious?

6 A Right.

7 Q And I wanted to ask you about the
8 categories down there. You've heard of Able
9 Telecommunications?

10 A No, I have not. I'm not familiar with
11 them at all.

12 Q How about Clara Vision?

13 A Yes, I'm familiar with Clara Vision.

14 Q Then top of the next column, Dr. Gene
15 Scott?

16 A Yes, I'm aware of Dr. Gene Scott.

17 Q How about WPCB?

18 A Yes. I'm aware of WPCB, Cornerstone
19 Television. That's correct

20 Q Do you sell, do you buy time on these
21 networks?

22 A I believe that the 700 Club, I don't

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1 necessarily make the purchase on that, because I don't
2 buy all of their time, but I believe that the 700 Club
3 is on Cornerstone and I know it is on one that's not
4 listed here which is WH -- it's the last one, World
5 Harvest Television, Galaxy 4 transponder 15.

6 Q The 700 Club is on that as well?

7 A Uh-huh.

8 Q I just want to make sure we have this in
9 the record. After WPCB, is Eternal Word TV network?

10 A Yes. That's a cable network, I believe.

11 Q That is a cable network as well?

12 A Yes.

13 Q But it's distributed, as you understand it
14 on C-band satellites so people with C-band dishes
15 could pick it up?

16 A Correct.

17 Q And then there's La Cadena del Milagro?
18 Are you familiar with that one?

19 A No, I'm not.

20 Q I'm assuming that the ESP might mean it's
21 Spanish?

22 A ESP, yes, it could be.

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1 Q It says that at the bottom.

2 A I don't see some of these because my dish
3 only gets certain satellites because of its screen.

4 Q New Inspirational network?

5 A Yes.

6 Q Odyssey?

7 A Uh-huh.

8 Q Now all of these that -- on this column
9 that I've listed are 24-hour religious programmings,
10 do you understand?

11 A That's correct.

12 Q On the first column that Able
13 Telecommunications, is that really on just on Sunday
14 at 10 a.m. Is that what that means when it says Sun
15 10a?

16 A I don't know. I've never seen that
17 listing before. I've never looked at it.

18 Q Back to the other column then, SDA Good
19 News network is another religious programmer. It runs
20 from 10 a.m. to 12 midnight?

21 A Uh-huh.

22 Q Shepherd's Chapel network is 24 hours?

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1 A Yes, but I can't reach that. That doesn't
2 reach my area.

3 Q How about Three Angels?

4 A Yes.

5 Q That's actually Three Angels Broadcasting
6 network?

7 A Uh-huh.

8 Q You've purchased time for --

9 A No, we do not buy time. The only areas
10 that we buy time on is for example we're on
11 Cornerstone TV because we buy time on the station
12 itself and they collect and send that out to other
13 markets, none of which we measure or count in that
14 purchase. That World Harvest Television time that's
15 purchased on that network is purchased in order to
16 reach broadcast entities because we have not been able
17 to discern a measurable audience from the C-band
18 audience market.

19 This is a means of distributing the
20 program to broadcast stations across the United States
21 of which we have a long list of those who take it down
22 and then either broadcast it as its fed or tape it and

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1 run it another time.

2 Q I see. Trinity Broadcasting network, I
3 think you brought that up before.

4 A We do not purchase time on Trinity.

5 Q But they are a 24-hour religious
6 broadcaster?

7 A Yes, they are, but they're a combination.
8 They broadcast stations as well as they feed their
9 program out on satellite again to Christian stations,
10 but most of Trinity programming, if not all of it is
11 watched through a broadcast station in some market.
12 Very little of it is through the C-band dish.

13 Q And World Harvest TV?

14 A Same thing.

15 Q Now you've been testifying about the
16 difference between a broadcast station and the
17 networks that are on the satellite, but you had said
18 that religious programming brings a particular value
19 to the DBS ministry, both in the viewer and to the
20 carrier and that packagers, program packagers for the
21 C-band industry want to include this.

22 Do you know if any of these particular

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1 networks that we've listed here actually charge
2 viewers to watch their programming?

3 A Not that I know of.

4 Q Well, we can actually answer that, can't
5 we, by looking and seeing in this listing that there's
6 no little black diamond that says VCII plus
7 subscription channel for any of the religious items
8 that were listed?

9 A That's right.

10 Q Would that means that's in the clear?

11 A It's free, yes.

12 Q So these channels which have religious
13 programming including some with 700 Club and other
14 time that you've purchased, if you have a C-band dish,
15 these are free?

16 A Yes, and if you can reach that, get that
17 satellite.

18 Q You can point to that satellite, that's a
19 terrain problem, not a technical problem? Or not a
20 legal problem. If your dish can find it --

21 A If you can see the dish, you can see it,
22 that's correct.

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1 Q And these particular programs are all in
2 relatively popular satellites generally, aren't they,
3 for instance, G-4 is Galaxy 4. That's right smack in
4 the middle, isn't it?

5 A Yes, it is.

6 Q And G-2 is also a popular one and G-1, G-
7 5, Galaxy 5?

8 A Uh-huh.

9 Q Galaxy 5 has a lot of cable programming on
10 it, doesn't it, such as WTBS and WGN in Chicago?

11 A But I'm not aware whether they're
12 scrambled or unscrambled.

13 Q Well, those particular feeds, your
14 understanding that superstations are sold?

15 A Yes.

16 Q To subscribers in the backyard dish
17 market?

18 A Right.

19 Q For instance, Trinity Broadcasting which
20 is also on Galaxy 5 is in the clear, so there's no
21 subscription necessary, no payment necessary?

22 A That's correct.

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1 Q Well, I guess I'll ask you to explain to
2 me then if a program packager in the backyard dish
3 market, at least the C-band market wouldn't include
4 these programs in its package because it couldn't
5 charge a subscriber for them, if they can already get
6 it free, isn't that right?

7 A Well, I think, I'm not sure I agree with
8 your conclusion. I think that the issue is that there
9 is clearly a market that wants devotional programming.
10 These people make it pretty clear that's what they
11 want to see when -- by virtue of the fact that where
12 they can find it, they watch it.

13 The issue is not whether you can get it on
14 a C-band dish. If I had a choice of buying a C-band
15 dish or a direct broadcast dish, I would probably opt
16 for the least expensive and that means that the C-band
17 dishes are probably going to wane and smaller dishes
18 that are more convenient, easy to put up will continue
19 to grow.

20 The value to those people who are
21 competing for that market still remains the same, that
22 they want to offer the best variety of programming,

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1 variety of programs that they know have value to the
2 market they're out there for, trying to reach and
3 clearly religious or devotional programming is
4 important to a considerable segment of that market by
5 virtue of the number of people who watch it on
6 broadcast and so it speaks for itself.

7 Q At least as far as the C-band subscribers,
8 putting aside the DBS subscribers, as valuable as it
9 may be to them, subscribers, people who want to watch
10 that program that I listed which is religious
11 programming need not part with any money to watch
12 that?

13 A That's correct.

14 Q They've already sunk that cost in the
15 dish?

16 A Yes.

17 Q I just have a few more questions for you,
18 Mr. Hummel.

19 On page 3 -- I'm sorry, page 4, you speak
20 of the Orbit Magazine poll?

21 A Uh-huh.

22 Q And Orbit Magazine is the magazine that we

1 spoke of where this particular listing came from and
2 you report a survey that 13.9 percent of the large C-
3 band and KU band -- are there large KU band dishes?

4 A Well, the KU band dishes are significantly
5 larger than the DBS dish.

6 Q You're talking about like Prime Stars?

7 A Yes.

8 Q The one meter dish?

9 A Uh-huh.

10 Q Rated religious programs is the
11 programming they enjoy the most.

12 A No, no, as programming that they -- not
13 that they enjoy the most, programming that was most
14 important among those programs most important to them.

15 Q I thought I was reading what you wrote on
16 line 90, that's all. They rated religious programs in
17 the programming they enjoyed the most.

18 A That's correct, but there were several
19 kinds of programming they enjoyed the most, not just
20 one kind.

21 Q Well, I guess I'm confused. I thought it
22 said it indicated that 13.9 percent of those dish

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1 owners rated religious programs as the programming
2 they enjoyed the most.

3 A That's correct.

4 Q I guess I'm misunderstanding --

5 JUDGE GULIN: I think what you said before
6 was that there were several categories that they
7 enjoyed the most and then they list several
8 categories.

9 THE WITNESS: That's correct.

10 JUDGE GULIN: As programming they enjoyed
11 the most.

12 THE WITNESS: Among those programs that
13 they enjoyed the most are religious programming,
14 whatever else was in that three or four category,
15 their package.

16 BY MR. SEIVER:

17 Q But No. 1 on 13.9 percent of the people's
18 list was religious, is that what that means or am I
19 totally confused?

20 A No, you're confused.

21 JUDGE GULIN: Yes, the answer is yes.

22 BY MR. SEIVER:

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1 Q Let's move on to the DBS survey. Nine
2 percent of those surveyed reported that they enjoyed
3 religious programming most?

4 A Uh-huh.

5 Q Given the same misunderstanding I've had.
6 (Laughter.)

7 At least in the C-band market, those
8 subscribers that enjoy that programming are not paying
9 for it, am I right?

10 A That's correct. I'm sure there are
11 programs on C-band that they have to pay to get the --
12 to have decoded for, so there is programming on the
13 two C-band dish owners that they are probably paying
14 for in addition to the quote free programming, yes.

15 Q And on DBS outside of the superstations,
16 you said that there is now carried, is it Trinity?

17 A Trinity, yes.

18 Q Do you know which carrier has Trinity?

19 A I believe Echo Star and TV Direct both
20 have it.

21 Q Now Trinity is free on C-band, am I right?

22 A That's correct.

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1 Q Do you know if Echo Star is paying
2 Trinity?

3 A I have no idea. I'm sure they would not
4 divulge that information to me even if I asked them in
5 that I represent my client as the 700 Club not
6 Trinity.

7 Q Trinity is a seller of air time to the 700
8 Club?

9 A No, they don't sell time.

10 Q I'm sorry, I misunderstood that. You've
11 also said on page 5 that satellite program packagers
12 are in effect selling someone else's product. Now I
13 just wanted to focus on this. There is the religious
14 programming that's free, obviously they're not selling
15 that, but you're saying they're selling is the
16 superstition programming?

17 A They're selling a package of programs in
18 order to attract -- it's kind of like K-Mart. K-Mart
19 has a lot of products in the store. It may not be the
20 most important ones but in order to draw the customers
21 in to K-Mart they have to tell the people out there
22 that they have a good variety of programming or

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1 products in this case. So DBS operators know that to
2 bring people in they have to have that variety.

3 Now they may not charge them for that. It
4 may be in their basic package, but it's still
5 something that they put there in order to enhance the
6 value of the basic package, a similar way the cable
7 programmers have their basic package that includes a
8 variety of programming for which the consumer pays a
9 basic price to receive the program, the package in
10 general. And then they tier above that.

11 Q Have you reviewed any of the program
12 promotional materials that have been submitted in this
13 particular case?

14 A No, I have not.

15 Q So you have not had an opportunity to look
16 at Superstars or Netlinks or any of the other C-band
17 packagers?

18 A No, I haven't.

19 Q Same with for the DBS suppliers?

20 A Only promotional materials that appear in
21 Orbit Magazine. Those issues that I've seen, yes.

22 Q And you actually said on page 5 there in

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1 line 106 that Orbit Magazine plans to devote a
2 substantial portion of its March 1997 issue to
3 religious programming?

4 A That's what they told me, that's correct.

5 Q That is what they told you, do you know if
6 they did?

7 A I have no idea because Orbit sold out in
8 my market. I couldn't even find a copy of it.

9 Q Well, I didn't want to kill too many
10 trees, Your Honor, but I did bring the March 1997
11 issue of Orbit Magazine and if I could have the
12 indulgence rather than show it to everybody. Orbit is
13 not something else. If I could show it to the witness
14 and ask if there's anything on religious programming
15 in it or at least a substantial portion.

16 CHAIRMAN GRIFFITH: Mr. Garrett may have
17 the opportunity to look at the exhibit if he wishes.

18 MR. GARRETT: I just want to get the
19 baseball schedule out.

20 THE WITNESS: Unless it is buried in the
21 adult programming section which is sealed, I don't
22 believe it's in there.

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1 I must comment sir, however, that the
2 information was given to me by Orbit sales department
3 themselves directly when I inquired on what was
4 happening in the March program, in that I was looking
5 in to purchasing advertising space. I think you've
6 lost your schedule.

7 MR. SEIVER: I have no more questions.
8 Thank you, Mr. Hummel.

9 THE WITNESS: Thank you.

10 CHAIRMAN GRIFFITH: Any other cross
11 examination? Redirect?

12 MR. GOTTFRIED: Nothing.

13 CHAIRMAN GRIFFITH: All right, Mr. Hummel,
14 thank you very much, sir, you may step down. You're
15 free to go.

16 THE WITNESS: Thank you.

17 (The witness was excused.)

18 MS. WOODS: At a convenient time, I'd like
19 to comment on the order of witnesses for the next few
20 days. Is this a good time?

21 CHAIRMAN GRIFFITH: This is a good time.

22 MS. WOODS: Okay, conversations with

1 various counsel it appears that the order for tomorrow
2 will -- assuming we finish Ms. Kessler today be Mr.
3 Cooper and Mr. Wilson. And for Thursday, we have a
4 slight change in previous plans. We expect to leave
5 with Mr. Crandall, Joint Sports Claimants, followed by
6 mr. Sternfield, a network witness.

7 After discussion it still appears we will
8 need to meet on Saturday and so assuming that we don't
9 run very quickly through additional witnesses
10 tomorrow, we would have Mr. McLaughlin on Saturday and
11 then scheduled for next week will be Mr. Owens on
12 Monday and Mr. Gerbrandt on Tuesday.

13 CHAIRMAN GRIFFITH: Monday is?

14 MS. WOODS: Dr. Owens, network witness.

15 CHAIRMAN GRIFFITH: Tuesday?

16 MS. WOODS: Tuesday is Mr. Gerbrandt,
17 Joint Sports witness.

18 CHAIRMAN GRIFFITH: All right. Okay.

19 JUDGE GULIN: Let me just ask Ms. Woods,
20 if we were to go late Wednesday, Thursday, is there
21 any chance that we don't need Saturday or is that
22 pretty much hopeless?

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1 MS. WOODS: Well, my understanding is that
2 we really don't think we can cover Mr. McLaughlin in
3 half a day. If we could do that, we might be able to
4 manage it, but it sounds like that's not just going to
5 be possible given the concentrated costs.

6 JUDGE GULIN: All right.

7 MR. SEIVER: Your Honor, I think we did
8 finish before Ms. Kessler had arrived.

9 MR. LANE: She's on her way. I apologize.

10 CHAIRMAN GRIFFITH: All right, we'll take
11 a brief recess then until Ms. Kessler is available to
12 testify.

13 (Off the record.)

14 CHAIRMAN GRIFFITH: All right.

15 MR. LANE: Your Honor, I'm Dennis Lane. I
16 represent the Program Suppliers. I just want to make
17 a couple of brief comments. The issue here, we
18 believe, is the value of the programming on the
19 signals, although the rates are for the signals
20 themselves, it's our belief that people take
21 programming, they take signals to get particular types
22 of programming.

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1 We represent the Program Suppliers which
2 is the group who has all the series and movies as Ms.
3 Kessler will testify. She'll give you some of the
4 examples. We believe series and movies are some of
5 the most popular programs by any measure and a very
6 important reason for satellite carriers to take
7 certain stations and more important for the carriers,
8 for subscribers to want to buy those stations.

9 We did not support, we did not calculate
10 a separate rate ourselves in our testimony. We're
11 supporting the rate that all the owners are supporting
12 here, that is the rate that the Joint Sports witnesses
13 have put on which is \$.35, \$.36, \$.38 rate.

14 So that calculation is not in our
15 testimony, however, we believe that part of the
16 valuation is determined by what types of programming
17 is on that and how important that programming is to
18 attracting and retaining subscribers.

19 Our second witness will be Mr. Cooper who
20 Bob Garrett and I were just talking about. We believe
21 he's testified in every proceeding and we think there
22 might be one he didn't testify in, but he also

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1 testified in the 1992 proceeding in this matter and
2 his testimony will give you an idea of some of the
3 rates that are charged by providers of this
4 programming to subscribers to give you an idea of what
5 the range is of that rate, something that the prior
6 panel found very helpful in its deliberations.

7 We've called Marsha Kessler to the stand,
8 Your Honor.

9 CHAIRMAN GRIFFITH: All right, Ms.
10 Kessler, if you'll raise your right hand, please?
11 WHEREUPON,

12 MARSHA KESSLER
13 was called as a witness for the Program Suppliers,
14 having first been duly sworn, assumed the witness
15 stand, was examined and testified as follows:

16 DIRECT EXAMINATION

17 BY MR. LANE:

18 Q Would you state your name for the record,
19 please?

20 A Marsha E. Kessler.

21 Q By whom are you employed, Ms. Kessler?

22 A Motion Picture Association of America.

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1 Q And what is your position at the Motion
2 Picture Association?

3 A I'm Vice President, Copyright Royalty
4 Distribution.

5 Q And could you briefly describe what your
6 duties and responsibilities are in that position?

7 A My primary responsibility is to allocate
8 the funds we receive from the panel to the represented
9 claimants and by funds I mean the cable television
10 funds under Section 111 and the TVRO funds under
11 Section 119.

12 Q So after this money is gotten, you're the
13 one who gets it out to the individual claimants, is
14 that right?

15 A I'm frequently one of the most popular
16 people in my industry. The week before the checks go
17 out, I am very popular.

18 Q Have you ever appeared as a witness
19 before?

20 A I have been a witness not as often as Mr.
21 Cooper, but in many proceedings before the old CRT,
22 Copyright Royalty Tribunal. I've been before the

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1 Canadian Copyright Board and this is my second
2 appearance before the CARP Panel.

3 Q And what were the issues that were
4 addressed in your prior testimony?

5 A The primary issues were the rules and
6 regulations of the FCC as they pertain to cable
7 systems carriage of broadcast stations.

8 I've also testified on different program
9 types.

10 Q And do you have before you a 5-page
11 document entitled "Testimony of Marsha E. Kessler"?

12 A Yes, I do.

13 Q And is that your testimony in this
14 proceeding?

15 A Yes, it is.

16 Q Do you have any corrections to that
17 testimony?

18 A Two tiny typos. On the last page 5, at
19 the end of the first paragraph the word "retrain"
20 should be "retain". I'm not sure whether that was a
21 typo or a Freudian slip, but at any rate it should be
22 "retain".

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1 And on page 3, at the top of the page
2 under item 2, there are three Star Trek series listed
3 and I did not capitalize the T in Trek under one of
4 those.

5 Other than that I have no additional --

6 Q We all caught that one, I'm sure.

7 A My boss caught that one.

8 Q Ms. Kessler is available for voir dire.

9 CHAIRMAN GRIFFITH: Any questions?

10 MR. SEIVER: No questions.

11 CHAIRMAN GRIFFITH: All right, thank you.

12 Go ahead.

13 BY MR. LANE:

14 Q Ms. Kessler, to whom does Program
15 Suppliers programming appeal?

16 A In my experience in this industry since
17 1982, the audience for syndicated product is a wide
18 variety of people, all ages, all economic backgrounds.
19 I have yet to meet a person who does not find
20 something on television in syndicated that they enjoy.
21 So I feel that we have a wide audience for our
22 product.

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1 Q And what is the basis for that appeal?

2 A I think the content of the programming
3 itself is the basis for the appeal to various kinds of
4 viewers.

5 We have entertainment programming. We
6 have educational programming. We've got cartoons.
7 We've got movies. We've just got a wide variety of
8 things that the public finds, the viewing public finds
9 attractive.

10 Q Have you offered in your testimony a list
11 of representative syndicated programming that's shown
12 on the stations carried by satellite carriers?

13 A Yes, I have.

14 Q The first type that you've identified is
15 entertainment programming. Could you just briefly
16 explain what you've listed there for us?

17 A I've listed a number of different program
18 types that I just made up on my own when I was writing
19 the testimony. The first one that I have referenced
20 in here is the evergreen type of program. This is a
21 program that has been around quite a long time. My
22 favorite example of the ones I listed is I Love Lucy

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1 which first premiered I think on the CBS network in
2 1951. So that is a program. I was born in 1950.
3 That's a show that has been on the air practically my
4 entire lifetime.

5 There are people who can tell you specific
6 episodes of I Love Lucy. You can mention the candy
7 eating off of the conveyor belt episode of I Love Lucy
8 and there will be a whole crowd of people who will
9 instantly nod, yes, they recollect that episode. So
10 that is one kind of program, an evergreen program that
11 popular when it was first on the air and continues to
12 be in syndication even today with a wide viewership.

13 Q Ms. Kessler, on page 1 of your testimony
14 you list I Love Lucy and you have KWGN listed next to
15 it. Could you explain why you did that?

16 A When I was compiling the listing of
17 programs for this testimony I wanted to make it
18 relevant to the hearings and so I listed at least one
19 broadcast station that's carried by satellite carriers
20 that also broadcast the program.

21 Q So for each of the programs that you've
22 listed, the station that's identified next to it is a

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1 station that's offered by satellite carriers that
2 carries that program?

3 A That's right.

4 Q You've also listed cartoon shows in your
5 testimony, is that correct?

6 A Yes sir.

7 Q And do cartoon shows appear only to
8 children in your experience?

9 A Well, speaking as a former child and as a
10 current adult, I can tell you that I love cartoon
11 programs. I know that at work or in other social
12 situations you can hear people talking about the
13 Simpsons, one of the current cartoon programs on the
14 Fox channel, KDVR in Denver.

15 For other people like a baby boomer like
16 me, something like Woody Woodpecker is also -- it
17 brings back memories of childhood. We still get a
18 chuckle out of it from time to time.

19 There are also some cartoon programs that
20 I think are primarily attractive to children. I'm not
21 particularly fond of the New Adventures of Winnie-the-
22 Pooh, but I know that many of my friends who have

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1 small children are really -- like that show quite a
2 bit.

3 Q Do some of the programs that we represent
4 in this proceeding appear on the network and are
5 network programs rather than syndicated programs?

6 A That's right.

7 Q Could you just explain sort of the
8 difference between being a network program and a
9 syndicated program?

10 A When a program is on the network, the ABC,
11 CBS or NBC network and actually Fox to some extent,
12 the program is available through one primary source
13 and then is simultaneously transmitted throughout the
14 country on affiliate television stations in a
15 particular market.

16 So when we say that something is on the
17 network, we know that it's going to be say on Thursday
18 nights at 8 o'clock and if you look Thursday nights at
19 8 o'clock on your CBS affiliate, regardless of what
20 town you're in, you will find the same program.

21 When something is available in
22 syndication, that means that the distributor or the

1 syndicator now has the rights to sell or license that
2 program to individual broadcast stations and that
3 station can be a network affiliate or an independent
4 station and that station can determine the time slot
5 for airing the program.

6 Q And is it possible for programs to be in
7 both the network run and in syndication at the same
8 time?

9 A Absolutely. In fact, I think if not all,
10 certainly a lot of the programs that I listed under
11 item 3 in my testimony are programs that a viewer can
12 turn on and see in the network time slot and find
13 somewhere else in syndication.

14 Q Is there something called appointment
15 television? Are you familiar with that term?

16 A I am familiar with that.

17 Q Could you explain what's meant by that?

18 A I have used that designation describing
19 game shows, but it actually can apply to virtually any
20 kind of program. In the case of a game show, people
21 make it a point to be at home in front of the
22 television at a certain time to watch a certain

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1 program. For example, I literally before coming here
2 finished the audit of my distribution of cable
3 television royalties and the auditor was telling me
4 that she rushes home every day to watch Jeopardy and
5 do her exercise machine and that is how she plans her
6 day so she can be home to watch Jeopardy. So I know
7 from reading the trades and from personal anecdote
8 that people do make it a point to be home to watch
9 certain programs.

10 Q And are there dramatic programs included
11 in the syndicated program category?

12 A There certainly are. There is a category
13 of program that I call high drama type program. These
14 are essentially the hospital-doctor shows, the cop
15 type shows where there is a crisis of some proportion
16 and the characters are engaged to resolving the
17 conflict. They generally run about an hour in
18 duration.

19 Q And are there imaginative type programs as
20 well in the syndicated program category and I wonder
21 if you could speak particularly to Mr. Siever's
22 favorite, Xena?

1 A Would you like a picture?

2 (Laughter.)

3 MR. SEIVER: I was trying to get an
4 autograph.

5 THE WITNESS: I'll see what I can do for
6 you if you're nice to us.

7 (Laughter.)

8 There certainly are. There are programs
9 of either a real character or an imaginary character
10 that take place in the past. For example, the first
11 program that I listed as Little House on the Prairie.
12 Now when I was a little girl, every little girl in the
13 United States read the Laura Ingalls Wilder series of
14 books. It was about a little girl growing up I think
15 in Nebraska, but somewhere in the western plains and
16 it was the progress of this little girl from her young
17 childhood until she gets married. So Little House on
18 the Prairie is an example of how that book -- that
19 series of books was converted into television
20 programming.

21 The favorite, Xena, the Warrior Princess,
22 I've not had the pleasure, personally, of viewing, but

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1 my understanding is this is an imaginary character,
2 possibly out of mythology, some time in the past, who
3 can do quite heroic events.

4 In addition to these imagining what it
5 could have been like shows in the past, we also have
6 futuristic type programs. My favorite one is Sliders
7 on the Fox network where people slip in and out of
8 various dimensions in different time periods on earth
9 and they go through a really cool graphic on the
10 screen and they land in places they don't know what it
11 is, but they're in danger, but they get out by the end
12 of the hour. So you're always relieved, but then they
13 go into another one the next time --

14 Q They never learn, huh?

15 A Well, see they can't get home. The thing
16 is they don't know how to get home to their own
17 dimension so that's a really good one.

18 Another example are the Star Trek programs
19 that were, I think the first one, I don't remember how
20 long Star Trek was actually in syndication, but it's
21 spawned spinoff Star Treks, taking place in space
22 ships and different universes, lots of high tech

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1 stuff, people who and creatures who look different
2 than we look. They have spawned all kinds of Treky
3 groups. If you go on the Internet you can see Treky
4 websites. I have a friend who, I don't know how it
5 works, but he participates in a Treky thing on the
6 Internet whereby as time goes by he is promoted. He's
7 going to be a captain the next time. He achieves a
8 certain event and he's very proud of his
9 accomplishments in his Treky thing on the web.

10 I can tell you that I have been to a
11 convention, a Star Trek convention, and there are
12 people who just love these things. It's like real
13 life to them. And it's certainly fantastic in the
14 sense that it deals with something of a fantasy or
15 imaginary nature.

16 Q Do you think that this interest would
17 translate into loyal viewers of these programs on
18 satellite carried delivered stations?

19 A Yes, I do.

20 Q You mentioned that syndicated program
21 category also includes programs that educates or
22 enlightens. Could you enlighten us about those,

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1 please?

2 A I'll be more than happy to. When I think
3 of a program that enlightens I think of one that
4 brings information to the public to which it may not
5 have ordinarily have access. So a current news
6 program such as the headline news, also known as Cable
7 News Network is the kind of program that the reporters
8 are nationwide. Any time there is something going on
9 in the world, we can have almost instant access to it.
10 When we had the Persian Gulf War, that was certainly
11 a time when headline news was most avidly viewed and
12 called upon by television viewers.

13 We also have the kind of programs that can
14 educate us in ways, again to which we may not
15 ordinarily have access. An example would be the
16 National Geographic type programs where we can learn
17 about animals or about geology, about plants. That
18 sort of thing or a Cousteau program where we can
19 explore the bottom of the ocean and learn about things
20 which most people will never have the opportunity to
21 do, but which we can look on television and find out
22 about.

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1 We also have programs of a current affairs
2 nature. We can look up and we can see the financial
3 programs like It's Your Business or the Wall Street
4 Journal and find out what's going on in the stock
5 market for a particular time.

6 One of these programs I imagine a lot of
7 people have not heard of the U.S. Farm Report. I put
8 that in there for a purpose and that is I started
9 working in this business in 1982. That program has
10 been on the air since even before I started doing this
11 kind of work. So while we here in Washington may not
12 be particularly keen on knowing farm news, in reality
13 this is an enormously, not just popular, but important
14 television program for the farming community in the
15 United States.

16 The final program, I've talked a little
17 bit about in this category is the "how to" type of
18 program and I reference the Bob Vila's Home Again
19 program. I can tell you from persona experience I
20 have learned how to hang sidewall by watching the Bob
21 Vila show, so that's an important program to me and
22 it's something that I truly did learn how to do it

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1 from that show.

2 Q Do the syndicated program category also
3 include specialty programs that just may be a one time
4 event?

5 A Our category does include that and the
6 type of thing that I've referenced here are the
7 special events like 4th of July fireworks or a New
8 Year's Eve party, a Christmas parade, that sort of
9 thing that takes place one time in one city and then
10 it is no more. Those also have -- there are people
11 who love parades and they will watch a parade show
12 with a great deal of enthusiasm.

13 Q Is there also sports and leisure
14 programming within the category?

15 A We have sports and leisure as well. We
16 have car shows. We have fishing shows. We have race
17 shows, car race shows, triathlons. We have shows like
18 George Michael's Sports Machine which show clips of
19 games from the previous week. We have funny shows
20 like the baseball and football blooper type programs.
21 These are not sporting events, per se, but programs
22 about sports.

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1 Q Now all the programming that we've talked
2 about so far is a certain type of program, is that
3 true?

4 A That's right. We've been talking about
5 series.

6 Q And could you just briefly describe what
7 a series program is?

8 A A series program is one that the
9 scheduling is what we call stripped. When we say
10 something is stripped, we mean that it runs in the
11 same time slot usually Monday through Friday, maybe at
12 7:30 or 6:30 or in a particular time slot on the
13 weekends. The characters -- you know who the -- the
14 viewer knows who the characters on the show are. They
15 recognize the people from one episode to the next.

16 Q Does the program supplier category include
17 another type of programming?

18 A The other kind of programming in our
19 category is our movies.

20 Q What kind of movies would be included?

21 A All kinds of movies. We've got mystery,
22 drama, sci-fi, musicals, historical type movies, any

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1 movie whether it was made for television, in the
2 theater years ago or whatever is included in our
3 category.

4 Q Are certain of the satellite delivered
5 stations heavily movie lineups?

6 A They are, in particular the independents
7 carry a lot of movies.

8 Q And could you identify some of those
9 stations for us?

10 A Sure, WTBS in Atlanta; WPIX in New York;
11 and WSBK in Boston.

12 Q Are the programs you've identified in your
13 written testimony or this afternoon the full extent of
14 the syndicated program category?

15 A While I've covered basic types of
16 programming, I really have only touched on the
17 surface, the programs encompassed in our claim or in
18 our category. This gives you a taste of the kind of
19 programming that the program suppliers offer.

20 Q Do you think that syndicated programs are
21 important to satellite carriers?

22 A I think they are. I don't remember who

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1 said this, I was here just briefly and during opening
2 statements, but the satellite carriers are certainly
3 delivering a signal, but it's not a signal, it's a
4 signal with content and certainly a good portion of
5 that content is the programming offered by the program
6 supplier group, so I certainly believe it's enormously
7 important and popular.

8 Q What factors go into making syndicated
9 programs?

10 A I would say two things. one is certainly
11 the creative genius of the people who come up with the
12 programs, but secondly without the money to support
13 the genius, the genius cannot be expressed, the
14 creativity cannot take place.

15 It takes a lot of money to make a TV show.

16 Q How are those costs recovered?

17 A Those costs are recovered, if it's a
18 program that's produced for the network, the programs
19 will be sold to the network, not for the full value of
20 the production cost, but at some amount less than that
21 and so that the gap has to be made up with other
22 venues.

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1 Q Do the carriers use the syndicated
2 programs for their own gain?

3 A Well, they charge subscriber fees for
4 television signals and the signals contain our
5 programming, so in my opinion they do.

6 Q And should the panel consider these
7 factors in setting rates in your judgment?

8 A I certainly hope that you will do that.

9 Q And why is that?

10 A I would like to have more money to
11 distribute to my companies so that we can keep the
12 creative juices nurtured.

13 Q Those are all the questions I have.

14 CHAIRMAN GRIFFITH: All right, cross
15 examine.

16 CROSS EXAMINATION

17 BY MR. SEIVER:

18 Q Thank you. Good afternoon, Ms. Kessler.

19 A Hi.

20 Q Nice to see you again.

21 A Thank you.

22 Q Just picking up on your last comment, do

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1 you think there's not enough money going around to
2 your members?

3 A I never think there's enough money going
4 around to my members and non-members. You know that
5 we don't represent just the studios, but probably over
6 100 claimants, big guys and little guys.

7 Q And you talked about how it takes a lot of
8 money to produce shows and is there a direct
9 correlation between the amount of money that's spent
10 on the shows and the quality of the shows?

11 A Could you tell me what you mean by
12 quality?

13 Q You can spend a lot of money and make a
14 show that is taken off the air very quickly and
15 doesn't have a run and it's not evergreen. It's not
16 imaginative. It's not in any of your listing of
17 popular programmings.

18 A Okay, I see, but I didn't know what you
19 meant by quality. I would say there's a lot of ways
20 of looking at quality. The Star Trek programs,
21 because of their technical aspect of them are
22 certainly high high quality programs, but you might

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1 not like them and consider them to be of low quality.

2 Q Didn't the networks cancel Star Trek when
3 it was first run on the networks?

4 A If you say they did, I'll agree with you,
5 but I don't know that on my own.

6 Q I'm sorry, I assumed from the reason that
7 you included them is because you understood the
8 history of Star Trek. That's not one of your programs
9 that you watch, I guess.

10 A Actually I love Star Trek Next Generation.

11 Q You don't remember growing up --

12 A No, Star Trek is different than Star Trek
13 Next Generation and I think you're referring to Star
14 trek.

15 Q Yes, that Gene Roddenberry produced one
16 that came into syndication. Isn't that what this is?
17 Gene Roddenberry, didn't he take it off the networks
18 when they canceled it?

19 A If you say he did, I'll agree with you,
20 but I don't have personal knowledge.

21 Q I was hoping you would confirm that.

22 A I believe you're telling the truth.

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(Laughter.)

I don't feel like arguing about it if you have those facts. I don't see any reason to dispute them.

Q As far as your testimony is concerned in this proceeding, this is a little bit different than what you normally do, isn't it?

A It certainly is.

Q And the cable distribution proceedings which your testimony is I guess famous, you focus on FCC rules and cable royalty calculations and the like, am I right?

A Correct.

Q And in fact, in those proceedings you've testified as to the Nielsen ratings, is that right, and how programs are perceived and viewed and trying to segregate who gets allocated what portion of the copyright royalties?

A That's right. I have talked some about viewing. I've talked quite a bit about the signal carriage rules, the old signal carriage rules. Is that what you're asking?

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1 Q Yes.

2 A Okay.

3 Q And would this be the first time you've
4 testified as not a relative value, but asking for a
5 rate increase or a particular royalty rate?

6 A I think the answer is yes. I think it is
7 the first time.

8 Q And your testimony here is if I have it
9 right is really focusing on the value that you say,
10 this programming that you've listed presents within
11 the superstation signals that are carried?

12 A Both the diversity and the value.

13 Q Do you understand the valuation process
14 that this panel is engaging in for purposes of this
15 proceeding?

16 A I'm not sure I understand the question
17 first of all.

18 Q Well, do you know what it is that the
19 panel is supposed to put a value on when it's done at
20 the end of the six months?

21 A They will evaluate the cost on a per
22 subscriber basis for the privilege of carrying

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1 broadcast signals.

2 Q Superstations and network stations?

3 A Correct.

4 Q Now this is just for satellite carriers,
5 not for cable operators?

6 A That's right.

7 Q Because that's done on a separate license?

8 A That's right.

9 Q And you are urging here I [presume then
10 that the current rates are inadequate and should go
11 up?

12 A Of course.

13 Q Whatever they are, they're not enough?

14 A That's right.

15 Q But at some point you feel that you'll be
16 satiated and there will be enough money that's being
17 generated?

18 A How can I answer that question? I will
19 certainly be very happy and not just me, but our
20 companies would certainly be delighted to have a
21 higher royalty.

22 Q And your companies are participants in the

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1 distribution proceedings for satellite royalties,
2 right?

3 A Those C file claims.

4 Q And you are also participants in the cable
5 royalty distribution proceedings, isn't that right?

6 A That's right.

7 Q And there's considerably more money at
8 stake in the cable royalty proceedings?

9 A There certainly is although -- yes, that's
10 right.

11 Q And as far as your testimony today is
12 concerned, you're not urging that the cable royalties
13 are inadequate, are you?

14 A To my knowledge this hearing focuses on
15 119 royalties.

16 Q You'll get your money where you can get
17 it. I wanted to ask you about the valuation process
18 and that's when I was asking about what this panel was
19 obligated to do.

20 I presume, given your copyright expertise
21 that you know the term secondary transmission?

22 A Right.

1 Q And do you know if the panel here is to
2 value, obtain the fair market value of a secondary
3 transmission?

4 A My understanding is that the objective is
5 to approximate that fair market value.

6 Q And the secondary transmission is a
7 specific defined term, isn't it?

8 A Yes.

9 Q And do you know what that definition is?

10 A I'm not sure, may I give it to you by
11 example or analogy?

12 Q Absolutely.

13 A If we have WTTG, Channel 5 here in
14 Washington carried by a cable system in Hagerstown to
15 its subscribers, that is considered a simultaneous
16 secondary retransmission of the broadcast station
17 WTTG. Is that --

18 Q Okay, and the distinction of primary
19 transmission would be?

20 A That would be the broadcast to the D.C.
21 market.

22 Q To the D.C. market. And your

1 understanding in your testimony here you would agree
2 that there's a vast difference between the economics
3 of primary transmissions and the economics of
4 secondary transmissions, am I right?

5 A I don't feel competent to respond to that
6 question.

7 Q You understand the difference, but you
8 don't know whether there's a different valuation
9 process for one or the other?

10 A I'm not sure I understand the question, so
11 I'm not sure I can answer.

12 Q Let me come at it in a different way. I
13 wasn't trying to be obtuse. I just thought that --

14 A When you say -- the word that's throwing
15 me is valuation.

16 Q Well, that's what I think is throwing
17 everybody.

18 A Okay.

19 Q This panel is going to try --

20 A It's not just me then.

21 Q This panel is going to have to despite the
22 problems with wording come up with a value of a

1 secondary transmission and I'm trying to put it in the
2 context of a secondary transmission is by definition
3 a secondary transmission of a primary transmission.

4 A But not a second rate one.

5 Q I didn't say that. She's always arguing.
6 The primary transmission is a completely different
7 economic model is what I'm trying to say than the
8 secondary transmission economic model. Am I right?

9 A I'm not trying to argue with you. Are you
10 saying that the method by which a broadcast station
11 obtains and pays for programming is different from the
12 method by which a cable system or a satellite carrier
13 obtains and pays for programming?

14 Q I couldn't have said it better.

15 A Okay, then I agree with that.

16 Q And in fact, the owners and producers or
17 transmitters of the primary transmission are more in
18 the business of putting that primary transmission out
19 as widely as possible to as many people as possible in
20 order to obtain advertisers who will pay additional
21 funds to them because of the reach of that signal?

22 A You're saying that the broadcast -- ask

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1 again.

2 Q Maybe I should let you give the
3 explanation because it's easier --

4 A Are you saying that the broadcasters want
5 to make their programming available to as many people
6 as possible so that they can maximize their
7 advertising rates?

8 Q Absolutely.

9 A Okay, then I agree with that.

10 Q You agree with that.

11 A Okay.

12 Q Maybe we should switch.

13 A Okay.

14 Q And the secondary transmission market that
15 cable operators engage in and you would agree that
16 satellite carriers and cable operators are essentially
17 doing the same thing, packaging programming and getting
18 viewers to pay a fee for a package of programming?

19 A Right, correct, I agree with that.

20 Q That their reach is not based on
21 advertising, but more on being able to get people to
22 pay certain amount of money for package of

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1 programming?

2 A they certainly want to maximize their
3 subscribership.

4 Q They want to maximize their subscribership
5 and price points or programming that they sell retail
6 obviously work into that, right?

7 A What are price points?

8 Q Someone, a cable operator wants to charge
9 \$10 for a package of programming versus \$20 for a
10 package of programming. He's going to analyze whether
11 \$10, I'll get maybe three times the number of
12 subscribers. That would maximize his return rather
13 than charging \$20 which some people would pay but
14 maybe he'd have less money.

15 A Okay.

16 Q I'm just trying to do the economics of it.

17 A Okay.

18 Q And you agree with that approach?

19 A Uh --

20 Q Or you understand that approach?

21 A I don't have any experience in it, so I'm
22 trying to be agreeable with you, but I don't have a

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1 background on which to draw.

2 Q I'm still trying to take us back so I
3 don't think I'm going down the wrong unknown path, to
4 help this panel with their valuation obligation. And
5 this secondary transmission is generally marketed as
6 part of a package of some other secondary
7 transmissions, cable networks and other programming
8 that are combined and then sold in a package,
9 generally.

10 I was trying to just determine from you
11 that whereas a broadcaster really wants to maximize
12 the number of subscribers for purposes of maximizes ad
13 revenues, cable operators and satellite carriers want
14 to maximize the number of subscribers for subscription
15 revenue.

16 A That seems reasonable to me.

17 Q So as a consequence of us comparing
18 primary transmissions and secondary transmissions, we
19 would agree that the market, the economics of that
20 market are different for the two?

21 A I agree.

22 Q When you, your member company sells

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1 programming, that's the program suppliers, members
2 sell their programming, generally what you've listed
3 here is their sales of that programming to people who
4 are -- the first market we're talking about, the
5 primary transmitters?

6 A Correct.

7 Q And when -- are you familiar with the
8 details of the transactions that when a syndicated
9 sits down with KDBR in Denver and horse trades over
10 programming rights as to what changes hands, money, ad
11 time, whatever?

12 A I have absolutely no exposure to or
13 experience in that.

14 Q So you're not testifying that at least as
15 far as let's say Sliders, that KDVR in Denver is
16 underpaying the syndicator for Sliders?

17 A Actually, Sliders is a Fox show and KDVR
18 is a Fox affiliate. Possibly the arrangement is
19 different when something goes to an affiliate than
20 when it's sold outright.

21 Q Well, let's look at Jacques Cousteau on
22 WTBS. You're not testifying that whoever produces or

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1 owns the rights to Cousteau's programming is not being
2 paid enough for it by WTBS?

3 A I have no knowledge.

4 Q And do you know whether WTBS actually paid
5 a premium based on its cable and satellite carriage?

6 A I have no knowledge

7 Q You picked these stations because you do
8 know who are superstations and what network stations
9 are carried on the satellite?

10 A Yes.

11 Q Have you watched those stations yourself?

12 A I have neither cable nor satellite at my
13 house. I don't have a VCR or a microwave oven either.
14 But I've watched every show in here, just not through
15 the venue that you're asking.

16 Q As far then as your knowledge of the
17 relationships between the programmers and these
18 primary transmitters, you've got nothing to add to the
19 testimony or evidence here today?

20 A No.

21 Q Do you know whether or not the purchasers,
22 the primary transmitters get rights that are limited

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1 to a particular market or are greater than a
2 particular market?

3 A I don't -- I'm not sure I understand the
4 question.

5 Q Well, if you don't know the answer that's
6 fine, but let me try it a different way. When let's
7 say WTBS is buying Cousteau's Rediscovery, do you know
8 if they're buying national nonexclusive rights,
9 national exclusive rights or just Atlanta area rights?

10 A I don't know.

11 Q So if, in fact, someone that's a secondary
12 transmitter and I've used the example of Superstar as
13 one of the representatives is here, went to WGN,
14 uplink, and said we want to take this particular
15 programming, let's see some WGN programming, the U.S.
16 Farm Report, and that's all we want. We just want the
17 U.S. Farm Report. Let us have it and we'll put it on
18 the satellite. Is it your understanding that WGN
19 would have the rights to commit that kind of a
20 licensing arrangement?

21 A I don't know.

22 Q AS far as the areas in which the primary

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1 transmissions occur and you've listed the cities, WTBS
2 in Atlanta, WSBK is Boston and you've gone on down,
3 your understanding is that signals are picked up in
4 those areas and sold nationally through cable systems
5 or through satellite carriers?

6 A Yes, I know that.

7 Q And the members of your group, the program
8 suppliers I presume are as knowledgeable about that as
9 you are?

10 A They're possibly more knowledgeable.

11 q More knowledgeable, so that when whoever
12 owns Cousteau sits down with WTBS, they don't think
13 they're just selling to some --

14 A Absolutely.

15 Q Poor Atlanta station, not that all Atlanta
16 stations would be poor, but isn't --

17 A Particularly that one.

18 Q And are you aware of how advertising is
19 sold on the programming that your clients or member
20 groups --

21 A I have no experience or exposure to that.

22 q Now you do have some experience in knowing

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1 what the programs are and you list the ones that are
2 -- in the various categories. Now these are ones that
3 are currently on, is that correct

4 A I'm not sure in 1997, if that's what you
5 mean.

6 Q That's what I mean.

7 A Currently. I could not testify to every
8 single program.

9 Q And we don't know whether these shows will
10 be on in 1998 or 1999 or whatever?

11 A I'll place a bet with you on I Love Lucy.

12 Q How about Beverly Hillbillies? Are they
13 still on?

14 A I don't know anything about 1994 or 1995.

15 Q How about Petticoat Junction?

16 A I don't know.

17 Q Do you remember in the distribution
18 proceeding for 1989 the cable distribution proceeding,
19 that resulted in an order of 1992, do you remember if
20 you participated in that for Programmer Suppliers?

21 A I'm sure I must have.

22 Q I'd like to mark as our next exhibit 14.

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(The document referred to was
marked for identification as
Exhibit 14-X.)

A decision issued by the Panel on April
27, 1995.

Do you know if you were there?

A The whole side of that room was there.

Q I'm reminded of my inability to again --

A Do I get a copy?

Q No, you've memorized it, is that right?

A No.

Q Don't need to look at this. And the
reason I was asking you, Ms. Kessler, about this and
is this a familiar decision to you?

A Yes, it is.

Q If you would go to the page in the Federal
Register that's 15302, it's very close to the end.

(Pause.)

Are you with me?

A Yes.

Q There's a heading of paragraph that says
"Program Suppliers" and I want to ask you about

1 basically the middle of that paragraph and then the
2 bottom of the paragraph and I want to have you explain
3 something to me, if you want to read it just for a
4 moment.

5 A Starting with "For clues why"?

6 Q Yes.

7 A Okay.

8 JUDGE GULIN: I'm sorry, Mr. Seiver, I'm
9 running a little behind here. What page?

10 MR. SEIVER: 15302. It might be hidden by
11 the staple. In the far left corner it's headed --
12 well, a third of the way down it says Program
13 Suppliers.

14 (Pause.)

15 BY MR. SEIVER:

16 Q Do you remember this issue and have you
17 read this decision before?

18 A Yes.

19 Q In that part that's almost smack in the
20 middle where it says "this indicates", do you see
21 where I am where this says "this indicates that
22 although syndicated series have high totals in

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1 viewing, cable operators do not expect to have to pay
2 that much for them. This was corroborated by Mr.
3 Wussler, a former president of WTBS who testified that
4 the broadcast licensees for such shows as "The Beverly
5 Hillbillies" and "Petticoat Junction" are relatively
6 cheap."

7 Now you know why I asked you about whether
8 those two shows were still on.

9 A That's right, but I would note that Mr.
10 Wussler is not a cable operator.

11 Q He is the former president of WTBS?

12 A That's right.

13 Q And the broadcast license fees is what he
14 was testifying to, is that right?

15 A My recollection is yes.

16 Q And because the way it works is that a
17 broadcast licensee, the primary transmitter, buys the
18 rights to these programs which then the secondary
19 transmitter picks up as part of a whole signal?

20 A Right.

21 Q The secondary transmitter can't say I just
22 want Beverly Hillbillies or just Petticoat Junction?

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1 A Correct.

2 Q In fact, that would be copyright
3 infringement if they started cutting down the signals.

4 A That's my understanding.

5 Q That they have to carry the entire signal
6 with the associated ads and lead ins.

7 A Right. Maybe that's the answer to you,
8 the question you asked about the Farm Report.

9 Q Well, you are an expert and maybe I could
10 just make sure we got that. If it's a broadcast
11 signal, that is a particular carriage that's
12 designated under section 119 of the Copyright Act.

13 A Right.

14 Q If the Farm Report shows up at WGN on a
15 video tape, my thought was could they take that video
16 tape and hand it to SuperStar and say you do what you
17 want with it?

18 A I see. Number one, I don't know if they
19 could retransmit just the WGN feed of that. Also, I
20 don't know who the copyright owner of the U.S. Farm
21 Report is. It possibly is someone other than WGN. In
22 fact, I would bet a lot of money it's somebody other

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1 than WGN.

2 Q As we look at this, there are a lot of
3 different people involved in creating the programs
4 which are included on the superstations.

5 A That's right.

6 Q You would say hundreds, thousands?

7 A Are you talking about individual humans or
8 corporations?

9 Q Individual entities that would be
10 licensing rights and bartering these transactions with
11 the broadcasters.

12 A Possibly thousands.

13 Q Possibly thousands. And even your group,
14 Program Suppliers, is only a subset of the program
15 producers that wind up on broadcast television.
16 Right?

17 A That's correct.

18 Q It's major league sports, we have the
19 devotional people, we have the music people, all the
20 people that show up at the distribution proceedings.

21 A Right.

22 Q And within those groups of claimants,

1 there are sub-groups. Am I right? Well, I would
2 presume within your Program Suppliers group you have
3 got people that make movies, people that do syndicated
4 --

5 A I see. Yes, that's right.

6 Q Is part of that the phase 2 controversy
7 that happened in these distribution proceedings?

8 A What a phase 2 controversy is, MPAA has a
9 methodology for allocating the royalties. It is based
10 on distant cable viewing. There are two groups of
11 claimants, one being broadcast stations and the other
12 being multi-media entertainment, who do not like the
13 MPAA methodology and they go for their own share of
14 the fund. So that's phase 2, meaning plaintiffs
15 within a category --

16 Q Of program suppliers.

17 A Right, within the program supplier
18 category.

19 Q They fight amongst themselves for their
20 shares of that.

21 A Over the share that we already got for
22 them.

1 Q I presume that happens with major league
2 baseball, the NBA, and baseball -- I mean the Joint
3 Sports claimants, the NBA, baseball, whomever might be
4 saying my sport is more valuable. I don't like your -
5 -

6 A In a phase 2 controversy?

7 Q In a phase 2. I am just trying to put an
8 example --

9 A Not against programs.

10 Q No not against Program Suppliers, within
11 their own claimant group.

12 A Possibly, but I don't know what goes on in
13 their --

14 Q But at least for the Program Suppliers
15 claimant group, you have explained that.

16 Do you believe that the licensing
17 mechanism that we have in place here kind of forces
18 everybody to basically agree how these funds are going
19 to be distributed? I mean this is a statutory
20 mechanism that kind of sticks everybody in this room
21 and gets us going. Isn't that right?

22 A Well I'm not sure is I would -- I would

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1 say we certainly have to take what is awarded to us.
2 In our hearts, we may not agree to it.

3 Q I guess probably nobody agrees that it's
4 enough.

5 A That's right.

6 Q My comment that I had asked you -- or the
7 point that I had asked you to read about in the 1992
8 decision was just one of the points. I wanted to look
9 further down. If you have read it all, I am not
10 trying to skip anything in particular, I was just
11 going over the stuff about the Bortz survey.

12 Then there was this last paragraph. I was
13 wondering if you could explain to me. This award,
14 which is the 60 percent to Program Suppliers.

15 A Okay.

16 Q Includes a continuing credit for harm
17 based on our previous record, but quantifiable
18 evidence is still lacking. Do you know what that
19 means? What's the harm they are talking about?

20 A Harm means harm to the copyright owner
21 when he loses the exclusive right to say where his
22 program is going to be aired.

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1 Q Do many purchasers of programming, and
2 broadcasters are the primary transmitters, pay rights
3 to be exclusive in a particular area?

4 A I don't have any experience on which to
5 draw to answer your question.

6 Q Do you know the term syndicated
7 exclusivity?

8 A Yes. I do.

9 Q Do you understand that for syndicators
10 that exclusivity is also sold?

11 A Yes. I know that.

12 Q And are you aware that at least for
13 satellite signals that there is a distinction based on
14 whether or not a syndicated exclusivity has been taken
15 care of for the satellite superstations?

16 A I know that there is a rate for Syndex
17 Proved stations versus those which are not Syndex
18 Proof. However, it is my understanding, and I am not
19 trying to argue with you. It could be that I am
20 misinformed, but it's my understanding that the reason
21 a particular station may be Syndex Proof is not
22 related to section 119 requirements at all, but

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1 because the signal is also being provided to cable
2 systems wherein syndicated exclusivity is an issue.

3 If I am wrong about that, I'll stand to be
4 corrected, but that is my understanding of why a
5 station is designated Syndex Proof, not because of
6 119, but because of 111.

7 Q Do you remember in the proceeding, the
8 distribution proceedings subsequent to this one, this
9 was 1989. When I say this, in 14X, was 1989, that
10 there was another proceeding in 1990, 1991, before the
11 1990, 1991 and 1992 cable royalty funds?

12 A We just finished that recently.

13 Q And sad to say that actually it probably
14 started well over a year ago, didn't it?

15 A Actually it started several years ago. It
16 was aborted and then reconvened in December of 1995,
17 I believe.

18 Q I have some testimony from December of
19 1995. I notice it's a docket number of 1994. It was
20 a 1996 decision, so it was a long wait.

21 A Right. A long time.

22 Q Is your boss Jack Valente?

1 A No.

2 Q Is he in your organization?

3 A I think he works there, yes.

4 Q Do you recall any testimony from him as to
5 whether or not syndicated exclusivity was something
6 that was a valuable item for programmers?

7 A I don't recall his testimony at all.

8 MR. SEIVER: I would like to mark my next
9 exhibit 15X, a transcript of Mr. Valente from the
10 1991-92 proceeding.

11 (Whereupon, the document was
12 marked for identification as
13 SBCA Exhibit No. 15-X.)

14 BY MR. SEIVER:

15 Q Again, I have excerpted it heavily only to
16 the point of trying to save a few trees. Ms. Kessler
17 I am most interested in page 2760. I have the initial
18 pages there just so you can see. I am sure it's
19 probably like a bad nightmare of everybody who was
20 here and how long that went on.

21 On page 2760, there's a question by a Mr.
22 Stewart, who I believe represented the broadcasters.

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1 I am really interested starting around line 11, if you
2 could just read on down to the point on the next page.
3 You are free to continue on, but at line five is where
4 my interest stops.

5 A Okay.

6 Q There is I think some more argument
7 between Mr. Valente and Mr. Stewart. I wanted to ask
8 you, does this refresh your recollection of that
9 testimony concerning syndicated exclusivity?

10 A I didn't read his testimony. I was not
11 present for his oral testimony.

12 Q Do you agree with what Mr. Valente said,
13 that Syndex while worthy and valuable in theory was a
14 slenderized piece of worthlessness in the market
15 place?

16 A If Mr. Valente said it, I can tell you I
17 believe it whole heartedly. But I don't have any
18 personal knowledge or experience that I can tell you
19 on my own.

20 Q Now we had been talking briefly about your
21 sale or your member company, I'm sorry. I
22 occasionally will say you. I mean Program Suppliers,

1 the member companies. Programs, the networks.

2 Are you aware of who is participating in
3 this proceeding besides Program Suppliers? Have you
4 been privy to that?

5 A I think virtually not all of the eight
6 claimant groups before cable, but many of them,
7 including the networks.

8 Q The networks generally aren't able to
9 claim in the cable royalties, or they are not able to
10 claim at all, am I right?

11 A Not under section 111.

12 Q Under section 111, the networks are
13 specifically excluded?

14 A Actually, network programming is not
15 compensable.

16 Q Network programming.

17 A However, networks also have some
18 programming in syndication, and in so far as they have
19 syndicated product, they are entitled to compensation.

20 Q Is that through your organization?

21 A Right.

22 Q So in a sense, the networks do

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1 participate, but as a member of the Program Suppliers.

2 A Correct.

3 Q Here you understand they have a right that
4 was found by our prior panel or the Tribunal that they
5 could participate directly in the royalties?

6 A Yes. I know that.

7 Q As networks. Are you are aware that ABC,
8 NBC and CBS are in this proceeding?

9 A Yes. I am aware of that.

10 Q Are you aware that at least as far as a
11 network on the copyright owners claimants side that
12 Fox is not participating?

13 A I understand Fox to be part of our group.

14 Q Fox is part of your group?

15 A Yes.

16 Q Not a network?

17 A I don't believe they are participating as
18 a network here.

19 Q Do you know what the rate is that's paid
20 under the copyright license for their programming?

21 A I wouldn't swear to it, but it's my
22 understanding that the rate is the same as the network

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1 rate, but I could be corrected on that. That's what
2 I believe.

3 Q They are participating for their non-
4 network syndicated programming, is that it, as the
5 commercial networks are as part of your group?

6 A Correct.

7 Q They are not participating for their
8 network programming?

9 A Can I tell you my experience in a previous
10 distribution?

11 Q Sure.

12 A We had a single distribution of royalties
13 for 1989, 1990, and 1991. I received money for Fox
14 under cable and under TVRO I paid to Fox for all of
15 its programming.

16 Q And under TVRO.

17 A And under TVRO, correct.

18 Q I am not going to ask you to --

19 (No response.)

20 MR. LANE: Excuse me, Mr. Seiver, but TVRO
21 is satellite carrier 119. That has not been a term
22 that we have used, so not to confuse the record. But

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1 is that what you meant, 119 is the --

2 THE WITNESS: Yes. What did I say?

3 MR. LANE: TVRO.

4 THE WITNESS: Oh, okay, yes. Under 119 I
5 paid Fox as a syndicator for all of its programming.

6 BY MR. SEIVER:

7 Q TVRO is television receiver?

8 A Correct. Synonymous with satellite or
9 119.

10 Q Now are you testifying here that in the
11 process of setting rates, the panel should acknowledge
12 that the creativity and originality that goes into
13 making syndicated programming means that the rate
14 should go up?

15 A Yes.

16 Q And is it also your testimony that if the
17 rate goes up, distribution of programming will be
18 enhanced?

19 A You mean it will get more money?

20 Q No. That it will be more widely
21 distributed if the rates are raised?

22 A I think that it's going to be more widely

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1 distributed regardless of whether the rate is raised.

2 Q At some point though will the rate get so
3 high that it will tend to reduce the output?

4 A I am a little bit lost in what you are
5 asking me.

6 Q Well, I am just trying to understand that
7 we don't have a free market as everyone complains.
8 You are asking for a free market. If you said it's a
9 dollar as opposed to 15 cents, do you think that the
10 satellite carriers would be able to sell the same
11 amount of programming that they are currently selling
12 if their costs go up like that?

13 A It is one of my -- it is my understanding,
14 and again, I could be corrected on this, that one of
15 the criterion by which the judges are going to
16 evaluate all of our positions is the relationship
17 between your industry and mine. I would hate to be
18 Solomon in this, I'll tell you, but it would be my
19 expectation that wherever we go with the rates, they
20 will certainly be something that approaches or
21 approximates a market value and also respects the need
22 of satellite carriers to earn a decent living.

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1 I don't know if that responds to your
2 question or not, but --

3 Q I'll take it. Now you have also said in
4 your testimony that your programming is a key
5 ingredient in the ability of satellite carriers to
6 attract and you corrected it, retain subscribers.

7 A Actually I think I liked retrain better.

8 Q Subscribers have to learn, I guess. Now
9 is key in that your understanding that the satellite
10 carriers are in competition with cable operators?

11 A When I wrote this, I was not thinking of
12 competition at all. Actually what I was thinking of
13 was another anecdote, personal experience. Several
14 years ago I was on the board of directors of a
15 condominium project in Falls Church. The properties
16 had tons of problems. The roofs were leaking, the
17 boilers didn't work, the elevator didn't work, and all
18 we ever heard at board of director meetings was when
19 are we going to get cable television. I was
20 astonished. I couldn't believe it.

21 So my personal experience is people want
22 programming on television. They like a nice signal.

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1 It certainly is wonderful to have a great signal, but
2 the signal is nothing without the programming.

3 I represent Program Suppliers. Of course
4 it is going to be my position that our programming is
5 vital to selling subscriptions for satellite carriers.

6 Q And I understand that if you have cable
7 and you have satellite, and maybe even the apartment
8 building has its own private cable, the element is is
9 that to attract and retain subscribers means you have
10 got to competitively be successful.

11 A You have got to have programming that the
12 viewing public wants to see.

13 Q But there are a number of other items too,
14 that your prices have to be right, and service has to
15 be good, and all that is going to work into it, isn't
16 it?

17 A I'll tell you, after my experience on the
18 board of directors, I think we could have charged them
19 a hundred dollars a month and they would have paid for
20 it. I mean they were rabid for it.

21 Q Have you invested in the cable industry?

22 A I have not.

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1 Q Have you watched the cable industry stocks
2 in the last months?

3 A I do not.

4 Q You don't know whether they have been
5 successful with the market generally?

6 A They are in business today.

7 Q I guess the degree of closeness to the
8 edge I guess. I'll withdraw that.

9 In your testimony about as I have now
10 tried to characterize it as competition, do you see
11 that the satellite carriers are directly competing
12 with cable operators in areas where there is cable
13 carriage and the ability to put up dishes?

14 A I understand that that is true.

15 Q People might not necessarily buy both, buy
16 one or the other?

17 A I don't have any personal knowledge of
18 that.

19 Q And as far as the quality of the picture,
20 in your understanding does the digital quality of
21 maybe a DBS program package make a difference as far
22 as the interest in watching Program Suppliers

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1 programming?

2 A You are talking to the lowest tech person
3 on the face of the earth. I am sure there is an
4 answer to that question, but I don't know it.

5 Q If you had two operators with your same
6 programming on both sets, and one was digitally
7 delivered and very clear and one was analog delivered
8 and maybe just the regular analog, do you think people
9 would prefer your programming on the digital clearer
10 picture?

11 A I don't know what digital and analog mean,
12 but I know I would like to have the clearer signal.

13 Q The clearer signal is important to you.
14 As far as your clients or members are concerned, have
15 they ever expressed to you that in their market
16 negotiations, the digital -- well, I'm sorry, clarity
17 of picture is important to them in negotiating their
18 contracts?

19 A I have not had such a conversation.

20 Q You also state towards the end of your --
21 in the last sentence, that you are asking the panel to
22 set royalty rates. You submit that the panel should

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1 encourage the continued development of syndicated and
2 other programming by setting royalty rates for
3 satellite carriers that more closely approximate the
4 free market value of programming. I am going to ask
5 you some questions about that.

6 Encourage the continued development of
7 syndicated programming. Syndicated programming is
8 developing today, isn't it?

9 A Yes. It is.

10 Q And it has developed over the last 40 or
11 50 years as well, given I Love Lucy and every other
12 show, has continued there.

13 A That's right.

14 Q You are not sounding an alarm bell that
15 without some increasing rates syndicated programming
16 is going away?

17 A Not eliminated entirely, no.

18 Q Are you unable to compete with other types
19 of programming because of the lower royalty rates that
20 are paid here?

21 A I don't know the answer to that question.

22 Q As far as more closely approximate the --

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1 and you said free market value.

2 A Actually, I do have an answer to that
3 question. I apologize. I think I told you that we
4 represent about 100 companies. I am not sure, but I
5 think maybe less than a dozen of those 100, maybe
6 eight or 10 of the companies are the large studios or
7 the large distributors. The remaining companies are
8 very small companies. When I calculate a share for
9 these companies, I carry it out to the fourth decimal
10 point, not because I am a freak about detail and
11 accuracy, but sometimes I have to work really hard to
12 get to the 0.0001 percent so somebody can get a
13 royalty check.

14 The guy who gets 0.0001 percent is
15 enormously grateful for that payment. I don't know,
16 quite frankly, I don't know what he uses his money
17 for. But I know that just prior to a distribution
18 time, my phone rings off the hook because people want
19 their money. This is important money to my companies.

20 I was just going to say so certainly any
21 kind of income certainly enhances that company's
22 ability to either produce and distribute new

1 programming or to buy programming for distribution.

2 Q Now these particular member groups, they
3 also look to other revenue streams besides what might
4 be distributed here when they sell their programming
5 to the primary transmitters. That's a fair market
6 deal where they are getting paid. Am I right?

7 A That's right.

8 Q So they do have that money, they are
9 getting paid there.

10 A They do.

11 Q And as far as their understanding of the
12 market place, satellite carriers, superstations, has
13 been going on for many many years, hasn't it?

14 A Right. Yes.

15 Q Cable and satellite and then DBS started
16 in 1994. So it's fair to say that these programmers
17 to the extent that they know what they are getting
18 into when they sell their programming to a WSBK or a
19 WTBS or someone that's on the satellite.

20 A They certainly do.

21 Q And do you have any reason to believe that
22 these program suppliers do not have the ability to

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1 negotiate in an arms length deal with these
2 superstations when they sell their programming?

3 A I don't know what arms length means. I
4 heard somebody say it here the other day, and I don't
5 know what that -- you mean face to face negotiation?

6 Q There's no compulsion. Right. Maybe that
7 one is bigger than the other for unequal bargaining
8 power, but at least there's no forced or compelled or
9 non-market rate that governs their dealing with the
10 particular station they are selling the programming
11 to.

12 A No. It's a matter of negotiation.

13 Q That's all in the open. And the
14 circumstances that surround that negotiation include
15 everybody's knowledge of superstations and satellites
16 and cable and MMDS and SMATVs and everything else. Am
17 I right?

18 A I am not sure they always understand.

19 Q But you had said you think your Program
20 Suppliers probably understand cable and the
21 technologies better than you do.

22 A Yes.

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1 Q You would be very surprised if one of
2 these Program Suppliers went to WTBS and thought they
3 were just selling to the Atlanta market?

4 A Oh I agree with that.

5 MR. SEIVER: That's all I have. Thank you
6 very much.

7 CHAIRMAN GRIFFITH: All right. Any other
8 cross examination? All right. Any redirect?

9 MR. LANE: Could I just have a minute,
10 Your Honor?

11 CHAIRMAN GRIFFITH: Surely.

12 MR. LANE: I just have a couple of
13 questions.

14 CHAIRMAN GRIFFITH: All right. Thank you.

15 MR. LANE: Thank you.

16 REDIRECT

17 BY MR. LANE:

18 Q Ms. Kessler, you were just asked some
19 questions about whether Program Suppliers were aware
20 that WTBS is widely carried by cable systems and
21 satellite carriers. Do you recall that?

22 A I do.

1 Q And in your judgement, is there any reason
2 why WTBS should pay the Program Suppliers for that
3 carriage by satellite carriers or cable systems?

4 A No.

5 Q And are you aware that satellite carriers
6 gain in subscription revenues from including WTBS in
7 the packages they sell to subscribers?

8 A Certainly. That is what they are in
9 business to do.

10 Q And to the extent that they gain, do you
11 think in your judgement it's fair for them to pay the
12 market value of that programming?

13 (No response.)

14 MR. SEIVER: Excuse me. I am objecting to
15 the leading nature of this line of questioning.

16 CHAIRMAN GRIFFITH: All right. You want
17 to rephrase the question?

18 BY MR. LANE:

19 Q Are you aware that satellite carriers gain
20 revenues from their subscribers for selling packages
21 that include WTBS?

22 A Yes. I am.

1 Q In your judgement, should that service be
2 subsidized by copyright owners?

3 (No response.)

4 MR. SEIVER: Objection again. This is
5 very leading.

6 CHAIRMAN GRIFFITH: Objection sustained.

7 BY MR. LANE:

8 Q Would the part of the market place
9 consideration in negotiation between Program Suppliers
10 and satellite carriers at section 119, were not in
11 existence be amount of gain that the carriers would
12 receive from including WTBS in their packages?

13 (No response.)

14 MR. SEIVER: Same objection and also
15 confusing.

16 CHAIRMAN GRIFFITH: And also what?

17 MR. SEIVER: Confusing. I didn't
18 understand the question.

19 CHAIRMAN GRIFFITH: I think it's leading.

20 THE WITNESS: I didn't get it either.

21 CHAIRMAN GRIFFITH: The objection is
22 sustained.

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1 MR. LANE: Someone once told me redirect
2 was the hardest questions. I have proved that point
3 and just pass any further questions.

4 THE WITNESS: This is the second time this
5 has happened between him and me in here. I get
6 increasingly embarrassed as time goes by.

7 MR. LANE: Those are all the questions I
8 have.

9 CHAIRMAN GRIFFITH: All right. We'll
10 adjourn today. Remember now, we're going to start at
11 9:30 tomorrow morning. Leave early because of the
12 heavy snow. 9:30 tomorrow morning. Thank you.

13 (Whereupon, the proceedings recessed at
14 4:10 p.m., to reconvene at 9:30 a.m. the following
15 day.)

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CERTIFICATE

This is to certify that the foregoing transcript in
the matter of: Hearing: Satellite Rate Adjustment,
 Docket No. 96-3 CARP-SRA

Before: Library of Congress
 Copyright Arbitration Royalty Panel

Date: March 18, 1997

Place: Washington, DC

represents the full and complete proceedings of the
aforementioned matter, as reported and reduced to
typewriting.



Copyright Arbitration
Royalty Panel



Satellite Rate Adjustment

03-18-97

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